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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Virginia

JOINT APPENDIX

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TWENTY-SEVENTH JUDICIAL CIRCUIT
OF VIRGINIA

(LOGO)

Commonwealth of Virginia

[Name And Address Omitted In Printing]

March 18, 1999

[Filed Aug. 31, 1999]

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Re: Commonwealth of Virginia versus Barry E. Black
Case Number 98-8954

Dear Counselors:

Please be advised that I have reviewed all of the memorandums filed in this cause, both in the General District Court and in the Circuit Court, on behalf of each of the parties, and the Amiscus [sic] Curiae brief filed in support of the defendant's position in this matter, and I have given due consideration thereto.

The issue before the Court is the motion to dismiss the indictment against the defendant, Barry E. Black, upon the ground that Section 18.2-423, Code of Virginia is unconstitutional and violates the freedom of speech violations of the First Amendment of the United States Constitution, and Article I, Section 12 of the Virginia Constitution. In support of that motion, the defendant alleges as follows:

1. Section 18.2-423 discriminates on the basis of content and viewpoint and is unconstitutional under the doctrine of *R. A. V. v. City of St Paul*.

2. Section 18.2-423 does not incorporate the requirement that the speech at issue be directed to the incitement of imminent lawless action and likely to produce such action, and as such is unconstitutional under the standard of *Brandenburg v. Ohio*.

3. The prima facie evidence standard of Section 18.2-423 creates an unconstitutional presumption.

4. Section 18.2-423 is unconstitutionally vague and overbroad.

Rather than discuss the issues in the chronology set forth above, the court has determined that it would be appropriate to consider them, to the extent necessary, in reverse order. I have chosen this approach since the ultimate reviewing authority, the United Sates Supreme Court, has held that in construing ordinances that Court is bound by the construction given to it by the State Court. *R. A. V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381; 112 S.Ct. 2538, 2542 (1992). First it is noted for the record that the Commonwealth in this case is represented, not only by the local Commonwealth Attorney, Gregory G. Goad, but also

by John McLees, from the Office of the Attorney General of the Commonwealth of Virginia. The Court is of the opinion that the arguments set forth in the memorandums filed on behalf of the Commonwealth represents not only the official position of the Commonwealth Attorney of Carroll County, but also the Attorney General's Office of the Commonwealth of Virginia. Throughout the lower court proceedings and in the current proceedings in the Circuit Court, the Commonwealth has maintained the gravaman [sic] of the offense is intimidation in that Code Section 18.2-423[1] criminalizes on the burning of a cross "with the specific intent to intimidate", (Comm. Brief Gen. Dist. Ct., Page 3 and Comm. Brief, Cir.Ct., Page 3). In addition, in support of its response to the allegation that the section is vague and overboard its position is that "intimidation" as used in such statutes, means putting one in fear of bodily harm and further that statutory construction would require this Court to construe the word narrowly, (Comm. Supplemental Brief, Page 10).

In responding to the defendant's allegation that the prima facie provision of the statute creates an unconstitutional presumption, the Commonwealth concedes that "the 'prima facie' provision does not preclude review by a case-by-case basis of whether the defendant did in fact intend to intimidate others by his act of cross burning. On the

---

[1] Section 18.2-423, Code of Virginia, states: It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

contrary, it *requires* such review. It merely establishes that a reasonable inference of such intent can be drawn from cross-burning. The ultimate burden of persuasion of intent to intimidate always rests upon the Commonwealth. Thus, it is always open to the defendant to contest the issue of whether that intent existed, and the burden is on the Commonwealth to prove such intent, as a matter of fact, beyond a reasonable doubt, and *without regard* to whether the defendant has presented evidence on that issue or not". (Comm. Supplement Brief, Page 9).

The Commonwealth concludes by stating "It is clear from reading the law that, notwithstanding the 'prima facie' provisions, the ultimate burden is still on the Commonwealth to prove beyond a reasonable doubt that the defendant *actually* intended to intimidate others by his actions".

This Court accepts the Commonwealth's position that the Code Section 18.2-423 reaches only the crime of intimidation when an accused actually intended to intimidate others by his actions, such limitation saves the statute from being a proscription of speech in violation of the First Amendment and Article 1, Section 12 of the Virginia Constitution. The narrow application of the provisions of the above referenced section can be adequately addressed by appropriate instructions to the jury and well defined perimeters with regard to admission of evidence to the very limited and precise criminal act defined therein.

Accordingly, the defendant's Motion to Dismiss the indictment is denied. I request that Mr. Goad contact Mr. Baugh to arrange a suitable date to proceed with the trial of this case.

I commend both of you gentlemen on the time, effort and excellent memorandums which you submitted to the Court in support of your respective positions.

With best regards.

Yours very truly,

/s/ Duane E. Mink
Duane E. Mink

DEM:nc

[1] VIRGINIA: IN THE CIRCUIT COURT OF CARROLL COUNTY

COMMONWEALTH OF VIRGINIA, ***Plaintiff,*** ***vs.*** ***BARRY ELTON BLACK,*** ***Defendant.***	CR98-461

****

TRIAL BY JURY

****

Hillsville, Virginia

June 23, 1999

[2] VIRGINIA: IN THE CIRCUIT COURT OF CARROLL COUNTY

COMMONWEALTH OF VIRGINIA, ***Plaintiff,*** ***vs.*** ***BARRY ELTON BLACK,*** ***Defendant.***	CR98-461

* * *

Report of all the testimony, together with the motions, objections, and exceptions on the part of the respective parties, the action of the court in respect thereto and other incidents of the trial held in the case of the Commonwealth of Virginia, Plaintiff, vs. Barry Elton Black, Defendant, tried at Hillsville, Virginia, on the 23rd day of June, 1999, before the Honorable Duane E. Mink, Judge of the Circuit Court of Carroll County, Virginia.

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[8] HILLSVILLE, VIRGINIA. JUNE 23, 1999. 9:00 A.M.

(Court Reporter is sworn to take down and transcribe the proceedings in this case faithfully and accurately to the best of her ability and to be subject to the control and discipline of the Court.)

IN THE COURT'S CHAMBERS - OUT OF THE PRESENCE OF THE JURY

[Present are the Court, the Clerk, the Court Reporter, Mr. Goad, Ms. Collins, Mr. McLees, Mr. Hurd, Mr. Baugh, Ms. Davis, and the Defendant, Barry Elton Black.]

MR. BAUGH: Your Honor, I have advised the Defendant of his right to be present during bench conferences and chambers conferences and under *Rogers vs. United States*, he's elected to waive his right to be present.

THE COURT: Oh, really? All right. Of course, you have every right to be present throughout, you know.

MR. BLACK: Yes, sir. I understand, but I have all confidence in my lawyer. There's no sense in me, [9] because it's, it's, but all, I'm a layman and it would be things I probably wouldn't understand anyway.

THE COURT: All right. I prefer to have you present, but if you would rather be some place else . . .

MR. BLACK: Well, if you would prefer to have me present, I'll stay, sir.

THE COURT: All right. The case on the docket for today is Commonwealth of Virginia versus Barry Elton Black. Is the Commonwealth ready for trial today?

MR. GOAD: Yes, sir. We are.

THE COURT: And is the Defendant ready?

MR. BAUGH: The defense is ready, Your Honor.

THE COURT: All right. Let's see. We can either have the arraignment back here before we go out front or we can go out front and have it done in open court. I have

elected to keep the jury on the third floor in the General District Court and just call the, call them up as we need them and we'll start with twenty (20), of course, in the beginning and then we'll send, send for the others. So with that procedure, I don't think it matters much - whether we do it back here in chambers or whether we do it in open court, eventually we'll have to tell the [10] jury in open court who the Defendant is and the charges against him and what his plea is.

MR. BAUGH: I have no objection to arraigning him in chambers.

THE COURT: All right.

MR. BAUGH: My counsel, my client has reviewed the charge, he knows the elements, he would waive formal reading and ask the Court to enter a plea of not guilty. He would demand trial by jury.

THE COURT: Very well. Then before I accept your, the waiver of the reading of the indictment, the arraignment is simply reading the indictment orally to you either here in chambers or in open court and letting you make a formal plea of guilty or not guilty. Do you join in the waiver just presented by your attorney?

MR. BLACK: Yes, sir.

THE COURT: And is it your request to be tried by a jury?

MR. BLACK: Yes, sir.

THE COURT: All right. And you fully understand the charge?

MR. BLACK: Yes, sir.

[11] THE COURT: All right. Then before we go out and select our jury, is there anything we need to take up in chambers?

MR. BAUGH: Two (2) things – one (1) is a motion in limine I've just been served. I will halfway concede with my opponent, so – "*that the Court previously ruled that Virginia Code Section §18.2-423 is constitutionally valid, therefore the undersigned asks the Court to prohibit the Defendant from arguing to the jury the constitutional issue and to refrain from arguing the Defendant was exercising his right to free speech*" – I agree that it would be improper to ask the jury to rule on the constitutionality of the statute. I do believe it is within the Defendant's right to argue that it is a free speech issue and he is exercising his right to free speech. He's saying this because he wants to say it and he believed that it was protected. I believe that is, if nothing else, mitigating and it should be argued.

THE COURT: Mr. Commonwealth, why do you think the last portion of that – the right of free speech – would be improper to argue to this jury?

MR. GOAD: It would be our position that when [12] the Court upheld the statute, he essentially said that this is, the issues in this case are not constitutional in nature, when it upheld the statute, and therefore it would be improper for them to bring the Constitution issue back into it in consideration of the Court's prior ruling.

THE COURT: Well, they're not going to, as I understand it, they're not going to mention the constitutional, the constitutionality of the statute.

MR. BAUGH: That's exactly right.

THE COURT: But why wouldn't it be mitigation if he feels he was exercising free speech and not for the purpose of intimidating, isn't that the whole thing? That it's, the statute says that if you do this, you're doing it with the inference at least that it's for the purpose of intimidating? Doesn't, does he just have to admit that he's intimidating? Doesn't he have the right to try to explain why, why he was doing it?

MR. GOAD: Yes. He does, but I don't think he has the right to say it's freedom of speech.

THE COURT: Anything else?

MR. GOAD: Judge, of course, what is an issue is whether there was an intent to intimidate. If he didn't [13] have the intent to intimidate, then he's not guilty, so I don't think that freedom of speech would apply there and so far as mitigation, that would only be in the punishment phase and he can argue that in the punishment phase.

THE COURT: Mr. Baugh?

MR. BAUGH: Your Honor, mitigation is also, there's mitigation of the elements and there's mitigation of punishment and it's my position that he, he is mitigating his guilt by arguing that he was under the impression or my arguing that he was under the impression that he was making a statement that he thought was lawful. The jury will decide whether or not it's in conformity with the law, but I would say that it is permissible and the Defendant does have the right to free speech whether this statute is constitutional or not, he still enjoys the right to free speech and I don't think the Court can take that issue from the jury.

I'm not arguing the legality of it, I'm arguing the factual validity of it.

THE COURT: Anything else?

MR. GOAD: Just that the freedom of speech is separate from intimidation of others and then again I, [14] mitigation is punishment, not guilt. He's either guilty or not guilty. There's no mitigation of it.

THE COURT: Well, I don't think the Commonwealth of Virginia or any other state can declare a crime of this nature to be a crime per se and it's a legitimate inference the jury may draw, but I think that, that the Defendant, since since he's faced with the provisions of the statute has the right to explain any other reason that he may have for burning that cross – whether it's good, bad or indifferent, I think he has the right to explain it and I'm going to permit you to let him explain it in that fashion, if that's his explanation.

MR. BAUGH: Or if I can raise it through an inference through another witness, yes.

THE COURT: That's my ruling, but you can't mention the fact, of course, the Court's ruled that it's constitutional. That's out.

All right. Anything else?

MR. BAUGH: The *voir dire* issues are going to be involved. Your Honor, I have received from my opponent, who's really, I wish he wasn't such a nice guy, he was kind enough to send me his objections to my proposed *voir* [15] *dire* issues. I will tell the Court – which puts me in a very strange position.

The Court is familiar with the *Charity* case. That's where the Judge in Virginia Beach refused to let me do *voir dire* and then the case was affirmed. Judge Annunziata said however, oh, well, so he may have violated the Canons of Judicial Conduct, it's harmless error. I had, I was up in Northern Virginia a couple of weeks ago and saw Judge Annunziata and I told her that, based upon that ruling, my only recourse now in a *voir dire* issue was to take the contempt. That's the only way I can preserve the issue. She thought it was funny.

The pressure, under the statute, Virginia has an extremely liberal statute on *voir dire*. I'm allowed to raise any issue that I believe will reflect bias or prejudice involved in the case. It's not limited to bias just against the Defendant, but bias and prejudice concerning the law. Based upon my investigation, I am of the conclusion that there are some people in the area who consider my client's behavior to be an embarrassment and to reflect poorly upon the community. My concern is that these people may seek to avoid that embarrassment by [16] disassociating themselves from the Defendant's conduct by punishing him severely or convicting him.

Therefore, I believe that is an issue that must be raised on *voir dire* to determine whether or not there is a sensitivity as to what a verdict of acquittal would do based on their sensitivities.

Additionally, counsel has objected to my commenting or talking to the jury about the range of punishment. As the Court is aware, this carries anything from a dollar ($1.00) fine up to five (5) years. Many prosecutors object to raising that issue on *voir dire,* whether or not they're willing to consider the full range of punishment if they're

already convinced that if he's guilty, I'm going to give him this sentence or give him this sentence. I'm willing to offer the Commonwealth the option of if we don't raise that issue and the Defendant is convicted, we'll just *voir dire* another jury on their bias concerning the full range of punishment and pick another one (1). But being as how we do have bifurcated trials with one (1) jury, I am entitled – going into this case – to determine if there are any preconceived notions of punishment in the event of a conviction.

[17] MR. GOAD: They can give, ask if they can consider the full range of punishment, but I think it's improper for them to know at the very beginning that it carries up to five (5) years in the penitentiary. That's not relevant until there's a guilty verdict and then at that time, under the proper instruction, they'll hear what the range of punishment is. I think it's wrong to tell them that at the very beginning of the trial.

THE COURT: Then would you, would you withdraw your objection if he simply tells this jury that they will be told that there is a range of punishment at the appropriate time if the Defendant is found guilty and then let him finish out the balance of the *voir dire*?

MR. BAUGH: I couldn't accept that option, Your Honor. To tell a jury that, ask them if they're willing to consider a full range of punishment without advising them, is I mean, it's pointless, it's a charade. The jury has to know that, if convicted, this is the range we're looking at.

THE COURT: Do you have case law to support that?

MR. BAUGH: No, Your Honor. There is very [18] little case law on *voir dire*. I am quite comfortable, well, now by Judge Annunziata, I guess, I did bring bond money just in case, Your Honor, I do not, the statute is liberal. There is no way that I, I have the representatives of the AG's office. They're real big on truth in sentencing. I don't believe that a, I would ask, I would dare the government to tell me how can, how can a jury intelligently answer a question can they consider the full range of punishment without being advised what it is? I mean, if, if they go back there and they think this is life, they're going to give a bad answer; if they think this is a dollar ($1.00) fine, they're going to give a bad answer. They don't know and there's no way for them to find out without informing them and plus I have a lot of confidence in jurors. I don't understand what the problem would be.

If the Commonwealth would be willing to tell me what the problem would be, perhaps I could come up with an option, but at this time, I, I know that I'm entitled to determine whether or not they have a bias or prejudice concerning any issue. Punishment is an issue in our state along with two (2) other states and the only way to [19] resolve it is to inform them and ask them. If you have another way to do it, I'll be glad to consider it.

THE COURT: Mr. Commonwealth?

MR. GOAD: I wouldn't have anything new. You know, the purposes of a *voir dire* is just that they will consider the full range of punishment and I think it's incorrect to tell them on the front end. That's appropriate for the punishment stage.

THE COURT: Since the Defendant is unwilling to accept the, the Court's suggestion, I think the Commonwealth's objection is well taken and the range of punishment at the *voir dire* stage is not appropriate.

MR. BAUGH: Then, Your Honor, you would place me in a conflict. Because of the ruling in *Charity* and my obligation to give my client effective assistance of counsel, I believe that if I proceed with this, he's not getting effective assistance of counsel and therefore I cannot accept the Court's ruling and, being as how Judge Annunziata has said that's harmless error, I must advise my client that he should terminate my services because I am about to enter into an effort where I know that I am giving ineffective assistance of counsel which I am [20] prohibited from doing by oath.

If I was guaranteed . . .

THE COURT: Let me ask you something.

MR. BAUGH: Yes, sir.

THE COURT: You're saying Judge Annuziata has said that this is harmless error. This is harmless error?

MR. BAUGH: Judge Annunziata in *Charity* has said that issues on *voir dire* like this are harmless error.

THE COURT: Oh. Oh. Not this particular question?

MR. BAUGH: No. Not the particular question. No. But I can tell you that that question was a question that I wrote out and the Judge gave in that case. We've

had this objection before and we've always prevailed. There is no case law and we've always prevailed on it. But, Your Honor, I, that's a charade on the jury and I, and it's also, I think it's going to have tremendous negative effect on my client. I have no case law to support it.

There is no case law. There's less than a page of case law under that statute in the annotations, but I would ask the Court if, unless someone can tell me how [21] that jury can intelligently decide what they will consider the range, I'm not going to be a party, I can't do that. I have to tell my client, I'd like a moment to go outside, I think he should terminate my services because I can't do that.

If I knew it was going to be preserved for appeal, yes, but in light of that ruling, the only thing I can do is either take the contempt – and I don't know if you built a new jail, you've got a nice new building, but I don't know if you've got a new jail – . . .

THE COURT: Well, we do, just, just so you'll know.

MR. BAUGH: Oh, thank you. I feel so much better. Then I'll take the contempt.

THE COURT: All right.

MR. BAUGH: I'll take the contempt. You can punish me appropriately, but I can't abide by that ruling. I'm sorry, sir.

THE COURT: Well, do you want to talk to your client? That will not cause the Court to change its ruling.

MR. BAUGH: I understand. Then, Your Honor, I'd [22] like to take an interlocutory on this one (1). It's so

dispositive of the issue. I want to get an interlocutory. I want to go up on this one (1). I don't want, I think . . .

THE COURT: What authority do you have to go up on an interlocutory?

MR. BAUGH: Well, if we agree we can do it, we can do it. I don't think I can violate my oath. And if I get out there and do it, you're going to cite me for contempt and I can tell you I'm going to do it.

THE COURT: Well, we'll see.

MR. BAUGH: Your Honor, I will.

THE COURT: Well, that's fine. You know, you have to do what you have to do, I assume, and I'll do what I have to do to . . .

MR. BAUGH: That's fine, but, Your Honor, you understand that if I do . . .

THE COURT: To preside over this case.

MR. BAUGH: If I know I'm going to jail, even though I don't mind going to jail, it is going to cause reservation and he's not going to get the full degree of advocacy he deserves. I would seriously suggest that the [23] government consider withdrawing this one (1) because we are going to consider it. The jury is going to know, if the jury is going to consider the full range, they're going to know up front.

THE COURT: We will recess – I need the approval of the Defendant to, to go off the record, but we'll recess the hearing and let each of you go to a place where you can discuss your position with your client, Mr. Baugh . . .

MR. BAUGH: Yes, sir.

THE COURT: And the Commonwealth can consider its position.

MR. GOAD: Yes, sir.

THE COURT: And I will give you approximately ten (10) minutes to do this and then come back.

MR. BAUGH: Thank you, sir.

THE COURT STANDS IN RECESS

THE COURT: All right. The Commonwealth have anything he would like to talk to defense counsel about? Do you have any resolution that you want to propose?

MR. GOAD: Yes, sir. I do.

THE COURT: Do you want to do it on the record or do you want to do it in privacy between you and counsel or how do you want to do it?

MR. GOAD: I'll just do it on the record.

THE COURT: All right. Very well.

MR. GOAD: Judge, while in recess, I've reconsidered my objection to the *voir dire* issue about the punishment and I'm willing to amend my objection to where it's okay for the jury in the *voir dire* to be advised of the range of punishment, but I want the Court to advise the jury of the range of the punishment as opposed to counsel.

MR. BAUGH: No objection as long as we do it.

THE COURT: All right. I guess we have an instruction in here that tells us it's, let me . . .

MR. BAUGH: All that great error gone to waste.

THE COURT: All right. And that range is, let's see, one (1) to five (5) years in the Department of Corrections or confinement in jail for a specific time but not more than twelve (12) months. I tell you what I'll do, I'll just . . .

[25] MR. GOAD: I've got extra copies if you want to pull that out.

THE COURT: I'll just put a clip on it and I can go to it rather than try to, all right. That apparently is resolved, so we'll go to . . .

MR. HURD: Judge, if I may add one (1) comment about it, as a result of our discussions, it will be helpful perhaps if the, if the lower end of the range was made doubly clear to the jury. A layman coming in hears "in jail up to twelve (12) months" he's going to focus on the twelve (12) months and not, not realize perhaps that it could be one (1) day to twelve (12) months.

MR. BAUGH: I don't mind telling the jury that. That's what I always do. I tell them it's from as little as one (1) day or one dollar ($1.00) fine up to five (5) years. I've done this before. If you want me to do it, I'll be glad to.

THE COURT: I'm basically going to paraphrase the instruction that I will give if we get to the penalty stage and you're entitled to elaborate on it, if you wish.

MR. BAUGH: Thank you, sir.

THE COURT: All right. Next? Now, let me say [26] something so we can move this along. Anything that's

in these proposed questions by Mr. Baugh that goes to bias or prejudice, I'm going to approve. I think that that's the whole purpose of the *voir dire* and I'm going to permit it. So with that in mind, let's go forward with the, with the balance of these objections.

Let's see. On Page 1 of Mr. Baugh's letter, there's a partial objection?

MR. BAUGH: Oh, yes. Let's see. The question, the topic is whether the panel member had, *"based upon the facts obtained either from the media or elsewhere, expressed any opinion as to the guilt or innocence of the Defendant or the outcome which should be had, either due to the Defendant's actions or due to his membership in the Ku Klux Klan"*.

Your Honor, I would submit that the second part that the Commonwealth has objected to *"or [to] the outcome which should be had, either due to the Defendant's actions or due to his membership in the Ku Klux Klan"*, I believe that it is obvious that my client is a member of the Ku Klux Klan. I believe there are biases and prejudices held by many people both for and against that organization and [27] his association with that organization and for that reason and the fact that the Klan name is going to be in there, I believe that that is a proper area in which bias or prejudice could occur and for that reason, it is subject to *voir dire*.

THE COURT: Mr. Commonwealth?

MR. GOAD: Judge, I think the first part of it sufficiently addresses the issue of bias or prejudice of the Defendant and I think the last half of it, as I indicated, would, you know, go too far in that area.

MR. BAUGH: Oh, I understand. Forgive me. May I speak, Your Honor? My concern is this, is that when talking with people about this case, some people are of the impression that because of the nature of the offense or because of the nature of the organization, that anyone who belongs to that organization be convicted or anyone who belongs to that organization should be more severely punished than someone who doesn't. The only way to cut off that prejudice is to ask them whether or not they've discussed what should happen if a member of the Klan is convicted of a crime.

THE COURT: All right. I'm going to overrule [28] the objection. I think that we want a jury that will not convict this individual by association and I think he's entitled to, to go into that. I'm going to, he should be tried on what he did and not the organization he belongs to.

What's next?

MR. BAUGH: The next question objected to is whether the panel member *"has heard, either directed to [the] panel member or overheard by [the] panel member, any suggested dispositions for the offense alleged against the Defendant"*. In the *Mu'min* case, M-U-apostrophe-M-I-N, the Supreme Court has said we cannot discuss the information that has been communicated, but there has been no bar against the result or suggested, we are not allowed to say what did you read or what did you hear, but – and I'm not going to ask that – but if someone has said that I believe someone, actually it is, it sort of goes into the question above it, and in a sense of fair play, I'll withdraw it.

THE COURT: O. K. O. K. So the whole, we don't have to address the three (3) items at the top of Page 2?

MR. BAUGH: Yes. I think, unfortunately, well, I can tell you that, I don't want to lowball you, Judge. [29] I'm, those areas will be incorporated in this, the one (1) you've said is not a, where I've already, you've already ruled on it. I mean, what outcome should be had either due to the Defendant's actions or due to his membership and those issues are going to be incorporated in that. That's going to happen.

THE COURT: I don't understand your point.

MR. BAUGH: What I'm saying is that, what I'm saying, Your Honor, is that the second issue, the second question and the third one (1) with its subparts are really one (1) question and so I was going to surrender the third question, but I can tell you that when doing the first one (1), those issues are going to come up – what was the suggested disposition, did they have, did they ever make a comment about what should happen in this case, things like that. If I get answers saying that they've obtained, they have an opinion as to the guilt or innocence and they have an opinion as to what the punishment should be, I think I have to ask them what it was. I mean, they're going to want to know, too.

THE COURT: Let me tell you, let me tell you what we're going to do. If that occurs, if we get to that [30] point . . .

MR. BAUGH: Where someone says . . .

THE COURT: That, yes, they've talked about it . . .

MR. BAUGH: All right.

THE COURT: Then we're going to stop the inquiry with that particular juror at that point, we'll, and at some point, we'll call that juror in by, by the juror, by himself or whatever . . .

MR. BAUGH: For individual . . .

THE COURT: Individually.

MR. BAUGH: O. K. That's fine.

THE COURT: And then we can go into what they've heard and whether or not they've formed an opinion, basically, and, and decide whether or not that juror is qualified.

MR. BAUGH: All right. That's fine.

THE COURT: And that's what I want on the, when we have the twenty (20) people out there, if there's an answer that, that indicates that we need to go further into an inquiry with that particular juror, I don't want to contaminate another group.

[31] MR. BAUGH: That's fine.

THE COURT: I'll call them back. But, and obviously we'll, we'll pretty well know which ones you'll want to call back and I'll give you that opportunity at some point if it looks like we need to bring, to bring a juror in just to make further inquiry.

MR. BAUGH: I think that's a much better procedure. I agree.

THE COURT: All right.

MR. BAUGH: The other ones, the remainder of them, some of them are not couched in terms of a question

because I, as I told you, these are areas about which I will discuss. I can tell you, for example, in the first one (1), I will ask the jury that, if any of them have disagreement with the presumption of innocence which means that when we begin a trial in the United States, a Defendant is presumed not to have done the offense and until such time as the government convinces them of it, does anybody disagree with that law, anybody see the Defendant as anything less than innocent. That's the . . .

THE COURT: I understand that.

MR. BAUGH: Yes, sir.

[32] THE COURT: All right. It looks like Page 2 with the, we've worked out the balance of Page 2.

MR. BAUGH: I should have numbered these. I'm sorry.

THE COURT: Now, Page 3.

MR. BAUGH: I believe you're ruled on that one (1). Didn't you say as long as it's couched in terms of bias or prejudice, all of these are bias and prejudice questions, the ones to which the government has objected.

MR. GOAD: Well, the first one (1) goes further, the first one (1) that I objected to . . .

THE COURT: Uh-huh.

MR. GOAD: On Page 3, goes further than the bias or prejudice. Then it goes forward to ask do they think a member of the Klan "*has a predisposition to commit certain types of crime[s]*". I think that goes beyond the general bias or prejudice.

MR. BAUGH: It has been my experience, Your Honor, if I might, that there are certain groups of people – and I've never had this one (1), but similar ones, but this is my first Klan case – but I have had situations where, say, drug defendants are Jamaican nationals or from [33] New York or I'm in a sodomy case and my client is an admitted homosexual. There are people who believe that certain people – because of who they are or because of they're from, the place from which they come – are more likely to commit a crime than someone else. It's the, it's flat-out prejudice and I believe that, it's my belief that there is, that the Ku Klux Klan is associated with certain types of behavior and I will, and the jury has to understand that, as you pointed out a moment ago, he's not to be tried for his association. He's to be tried as an individual for his actions on that date.

THE COURT: I agree. I think that he's, we need to know whether or not the, the mention of the Klan effects the disposition of this case and if one (1) has preconceived notions, then they shouldn't be serving – one (1) way or the other.

MR. BAUGH: Yes, sir. One (1) way or the other.

THE COURT: They may have sympathies the other way and think that the Klan . . .

MR. BAUGH: As is their right.

THE COURT: All right. Next. All of these, and I think they are, I'm going to let that be investigated by [34] the Defendant.

MR. GOAD: The one (1) that says *"send a message"* in it?

THE COURT: Now, that one (1). Let me look at this one (1).

MR. BAUGH: Let me see. Which one (1) is that? Oh, yes.

MR. GOAD: Second from the bottom.

MR. BAUGH: What is the *"send a message"*? *Buck vs. Commonwealth*, isn't it? The *"send a message"* is, the *"send a message"* argument on behalf of the Commonwealth is improper, according to *Buck vs. Commonwealth*. It's a Richmond case. About, what, seven (7) years? I believe you were in the office then when that was argued, about Steve Buck was the lawyer, in fact, and being as how the government is not allowed to argue the *"send a message"* argument, I can only assume that the inverse, that it is improper for the jury to *"send a message"* and that their guilt or deliberations are to be based upon his actions solely.

So relying on an inference from *Buck*, I would argue this is a proper question.

[35] MR. McLEES: I think that sentencing is always, that the deterrence of crime specifically and in general in the community is always an appropriate consideration in sentencing.

MR. BAUGH: I'll rely on *Buck*.

MR. McLEES: They can't find him guilty in order to send a message, but they certainly can sentence him in order to send a message.

MR. BAUGH: If the Court would like to view the case, *Buck* was a sentencing issue. It was before we had bifurcated trials, but I believe . . .

MR. McLEES: Well, that's the, that's the . . .

MR. BAUGH: He said we need to send a message with our, with the punishment.

MR. McLEES: The Commonwealth can't argue that in general in trying to convince the jury to find a man guilty because, of course, by finding an innocent man guilty, you don't send the right message anyhow. Once the man is found guilty and they're determining penalty, sending, the consideration of sending a message to others who might be tempted to commit the same crime is a, is imminently a proper part of sentencing.

[36] MR. BAUGH: If I may, Your Honor, I would point out that if my client as an individual is, should be punished with a one (1) year sentence, to give him a more severe punishment to send a message to other people for conduct he did not commit is equally violative of his rights. He is to be . . .

THE COURT: Aren't we already asking this jury if they're willing to consider the entire range of punishment?

MR. BAUGH: Well, I am concerned, Your Honor, and I don't think it's served by that because I, it is important that a jury knows that they are to convict him based on his conduct or acquit him based on his conduct and if he is to be sentenced, he is to be sentenced upon his conduct and his conduct alone, not to, to influence other people. He's not a scapegoat. He's not an effigy to be punished as an example. He's to be punished based upon his conduct.

MR. McLEES: Your Honor, they certainly can consider the necessity of impressing on other like-minded people that they shouldn't commit the same kind of deed and take that into consideration in fixing the punishment.

[37] THE COURT: I believe the Commonwealth's motion is well taken on this question. I'm going to sustain the objection.

MR. BAUGH: To which, of course, I will object.

THE COURT: Yes.

MR. GOAD: And then the next one (1) that starts at the bottom and goes to the top is clearly outside bias or prejudice if it's put the county in a negative light or positive image of the community.

MR. BAUGH: I thought that was a brilliantly drafted question.

THE COURT: Any further comments?

MR. BAUGH: The question for my client is, "if [any] members of the panel have a bias or prejudice that the alleged activities of the Defendant or the Ku Klux Klan are such that the image of the city or county [has] been cast in a negative light [and], if so, would a conviction or imprisonment of the Defendant be a likely method [for] maintaining a positive image of the community".

Your Honor, I think that we would be remiss if we did not say that because of the, I mean, this is the [38] first case I've had that's been reported in the BBC. There is and there will be a tremendous amount of pressure on these jurors because of the nature of the offense and the publicity.

There is, in all likelihood, the verdict that comes out of this jury today – and everyone knows it – will be on the front, it will be in international news and some on the front page. I mean, MS-NBC has already called and asked us to be on the news tonight regardless of the verdict. By the way, we said no.

To assume that the negative light issue is not an issue is disingenuous.

MR. GOAD: Of course, that comes after the verdict is over. You know, we're talking about bringing it at the, when we voir dire the jury. What he's saying about the international news and all that, yeah, that was previously, but since the Court's ruling on the constitutional issue, there's been very little publicity about this case. Neither of the local newspapers – the *Carroll News* or the *Gazette* – has any article about today's trial taking place, I don't believe. There's been very little publicity since the Court's ruling on the constitutional question. You know, so today we don't have [39] it too much, but afterwards certainly we will.

MR. BAUGH: I should tell the Court that I did tell MS-NBC that if Soledad O'Brian was going to do the interview, I might appear.

THE COURT: Uh-huh.

MR. BAUGH: But based on the Court's ruling on that one (1), you're going to have to, it's going to be a similar ruling to the next one (1).

THE COURT: I'm reviewing those now to see if . . .

MR. BAUGH: It is a package. In the interest of time, Your Honor, if you will, if the Commonwealth will permit me to have the question which is the first complete question on Page 4 – *"if members . . . have a bias or prejudice which compels their feeling personally embarrassed that this activity occurred in their neighborhood or jurisdiction"* – I think I can knock out the one (1) before and the one (1) afterwards in the interest of time.

THE COURT: Whether they agree to it or not, I will rule that that's fine.

MR. BAUGH: Thank you.

[40] THE COURT: We will go with, let you ask one (1). Now, that will, so I've sustained the before and after.

MR. GOAD: The one (1) that starts on Page 3 and goes to Page 4 you've sustained?

MR. BAUGH: Yes.

THE COURT: Yes.

MR. GOAD: And the second one (1) on Page 4 you've allowed?

THE COURT: Yes. You know, you can save your objection if you wish. All right. With, now, we're down to *"Will a verdict of not guilty reflect disfavorably on Carroll County?"*

MR. BAUGH: My concern there is that, as the Court is well aware, there are members of the community who are not going to serve on the jury and one (1) of the issues we do need to bring up is whether the jury has

contemplated whether or not when they go back in the jury room, they're going to make a, come up with a verdict that's going to make their neighbors happy and that happens in all cases. Only by, and I would couch it in terms of bias or prejudice, but I think it's important to [41] my client's rights that if we, we determine whether there is an influence in the panel to determine a verdict which will allow them to go home and speak to their neighbors or get a decent meal from their wife or husband.

THE COURT: Mr. Commonwealth?

MR. GOAD: I think that's beyond the proper voir dire. I think that's inviting them to argue.

THE COURT: I agree with the Commonwealth. We want to know their own biases and prejudices and whether they can sit on this jury and give, give the Defendant a fair trial. I feel like that the objection is well taken.

MR. BAUGH: Well, then, Your Honor, we would object to the Court's ruling because none of the questions that are proposed deal with the ever present influence of local public opinion which is always an issue in a case like this, local public opinion and the fear of being ridiculed like the O. J. Simpson jurors is a factor. When you talk to jurors, they do worry about that and this is the only question that addresses that issue.

And so I will couch my objection in terms of my client does have a right to, under Article I, Section 8 of the Virginia Constitution, to a fair and impartial jury [42] that is free from unreasonable influences and prejudices. I believe that until such time the record reflects that there is, there is no likelihood of jurors feeling pressured by their neighbors to come up with a given verdict, the only

way to raise that is with this question, until such time as the record is clear of that issue, my client is being denied of his right under Article I, Section 8 or he's being denied, denied the right to his right to counsel under Article I, Section 8 and the Sixth Amendment, his effective use of counsel because without that information, I'll be, I'm making strikes in the dark. So we preserve our constitutional issues.

THE COURT: All right.

MR. GOAD: The one (1) just up above that is similar. I don't believe we addressed that one (1) yet. Where at the end, it says a verdict of not guilty would reflect that "*activities of the . . . Klan are endorsed by the citizens of Carroll County*".

THE COURT: But he . . .

MR. BAUGH: That's already been struck.

THE COURT: He agreed to struck that if I would let him go with the question above.

[43] MR. GOAD: O. K. All right.

MR. BAUGH: But if the Commonwealth is offering us a substitute, that I should take that one (1) and lose the one (1) before it, in a sense of cooperation, I'm willing to do that.

MR. GOAD: No. I like the one (1) up above it.

MR. BAUGH: Because I believe it does, I believe it is a valid issue that Ku Klux Klan activities are endorsed and I would willingly give up the next one (1) because it covers the same topic.

THE COURT: All right. What about the, the remaining? The next objection – *"Are there any jurors who would change their vote concerning guilt or punishment, if guilt is the verdict, because they were in the majority and not because they agreed with the fellow jurors?"*

MR. BAUGH: That should be minority. I was tired. Whether or not they would change their verdict because they were in the minority.

The Defendant is entitled to twelve (12) jurors, not eleven (11) speaking for twelve (12). The only way to address that issue is to bring it up on *voir dire* – that it is not majority rule. It must be unanimous in every [44] one's verdict, everyone's conscious must be voted.

THE COURT: The basis of the Commonwealth's objection is what?

MR. GOAD: It's inviting the jury to argue and disagree.

MR. BAUGH: We'll stipulate that's a good thing.

THE COURT: I agree. I agree with the Commonwealth. I believe the jury will follow the Court's instructions and I think that that's argumentative and it doesn't help you determine whether or not there's any bias or prejudice.

MR. BAUGH: We would re-urge the same objections, the Constitutional objection, as the one (1) previous.

THE COURT: All right, sir.

MR. BAUGH: The government had objected to the last two (2).

THE COURT: I guess it's the same, the same basis, isn't it, as the one (1) I just ruled on?

MR. BAUGH: Yes. I would agree, Your Honor.

THE COURT: O. K. I'm going to sustain that objection and each of you, I guess, disagree for reasons [45] previously stated. Is that a fair statement?

MR. BAUGH: On behalf of the Defendant Black, that's correct, Your Honor.

MR. GOAD: Yes, sir.

THE COURT: And I feel the same way about the last question. I'm going to sustain the objection.

MR. BAUGH: I thought you had. Yes. We would have the same objection, Your Honor.

THE COURT: All right. I believe that does it, doesn't it, folks?

MR. BAUGH: That's it.

THE COURT: If we're ready to go, anybody need a break before we go and impanel the jury?

MR. BAUGH: If I could, and I know the government doesn't have to, but can the government give me an estimate of how many witnesses they have just so I can figure out whether or not we need hotel rooms for the night?

MR. GOAD: Sure. I'll be glad to and then you tell us, too.

MR. BAUGH: Sure.

MR. GOAD: Three (3).

[46] MR. BAUGH: Zero.

MR. GOAD: O. K. We'll be here one (1) day. I do have a couple of short matters for the record.

THE COURT: All right.

MR. GOAD: Judge, previously, I filed the notice of prior criminal convictions pursuant to § 19.2-295.1. I did file those in a timely matter, in a timely manner and according to the Code section, before the beginning of trial, I'm to provide defense counsel with a copy of those and I have complied with that provision.

MR. BAUGH: That's correct, Your Honor. It has been tendered. I will tell the Court that I have not had a chance to go over it with my client as yet and also there's a question because one (1) of them appears, there appears to be a vacation order somewhere of one (1) of these, I don't know which one (1). None of these, some of these don't even show up on the NCIC computer check and I don't even know how you found all of them.

We would object, all of them are extremely stale. I don't believe there are any past 1972?

MR. GOAD: There's a '74 and I think one (1) was '79. I'd have to go back and look, but it's all '70's at [47] the earliest.

MR. BAUGH: My only other concern would be the information tendered, there's one (1) sheet that shows a conviction, of course, they're entitled to that. The other sheet shows the punishment given for those offense and we would submit that's improper, that the jury did not, I mean, while I am entitled to notice, I do not believe that goes to the jury. The jury is told the number of offense and

I believe you're entitled to tell them the offenses for which the Defendant has been convicted, but as to what punishment might have been meted out, I would submit that it would be improper.

MR. GOAD: Well, we can go over that later.

THE COURT: All right. As long as we're, there is compliance and I agree that there may be some discussion later with regard to the total admissibility, but we'll go over that later, defer that until a later time.

MR. BAUGH: Yes, sir.

MR. GOAD: And, of course, previously the Court met Mr. John McLees and Bill Hurd from the Attorney General's office and previously there's been no objection [48] to them being here and working on the case and I'm assuming that still stands today?

MR. BAUGH: That's correct. It does.

THE COURT: All right. Are all three (3) of you going to sit at counsel tables?

MR. BAUGH: Or close by.

MR. GOAD: Or close by.

THE COURT: Well, do I need to, who do I introduce? That's all I need to know.

MR. BAUGH: All of them?

THE COURT: Just yourself or all of them?

MR. GOAD: Yes, sir. Unless you all want to be. Just me then, I guess.

THE COURT: Just you. All right. They're going to sit in the background. If they're going to sit at the table, I'm going to introduce them. If they're going to sit close, then . . .

MR. GOAD: O. K. Mr. McLees will be at the table next to me.

MR. McLEES: I guess he should introduce me then.

THE COURT: I think I should.

[49] MR. McLEES: Yes, sir.

MR. BAUGH: And I'd ask you to introduce . . .

THE COURT: Sara Davis, is it?

MS. DAVIS: Yes, sir.

MR. BAUGH: Sara G. Davis. Her mother wants that *G* thrown in there.

MS. DAVIS: You can leave the *G* out.

THE COURT: All right. Unless you need a little recess, we'll go get started.

MR. BAUGH: Two (2) or three (3) minutes please, sir.

THE COURT: All right.

MR. BAUGH: Oh, and the Defendant is waiving his right to be present at any bench conferences.

THE COURT: All right.

MR. BAUGH: Thank you, sir.

THE COURT: Thank you.

* * *

IN THE COURTROOM – IN OPEN COURT

[50] BAILIFF: Circuit Court for Carroll County is now in session, the Honorable Judge Duane E. Mink presiding. Silence is commanded while Court is in session. Be seated and come to order.

THE COURT: All right. Mr. Goad and Mr. Baugh, would you come forward and let me ask you a question?

* * *

CONFERENCE AT THE COURT'S BENCH

THE COURT: Sometimes we just call the jury taking the first twenty (20) names on the list and that might be the easiest way to do it today. Do you have any objection to that or do you want us to put the names in and do it by lot?

MR. GOAD: Whichever.

MR. BAUGH: I have no objection.

THE COURT: Then we're just going to take the first twenty (20).

MR. BAUGH: I have a question. Do we question from the table or do you want us to stand?

[51] THE COURT: Whatever you're comfortable with. I want you to be, I want everybody to be comfortable in my court.

MR. BAUGH: Thank you. All right.

THE COURT: If you feel comfortable sitting, fine; if you want to go back and forth, you can do that.

MR. BAUGH: Thank you, sir.

THE COURT: All right, sir.

* * *

THE COURT: All right. The case on the docket for today is Commonwealth of Virginia versus Barry Elton Black. Both parties have announced ready and we're now calling the jury that's awaiting on the first floor. Bring in the first twenty (20) and if they will stop in the back and we'll call their names as they come forward.

MR. GOAD: As far as the seating of the jury, will they start on the back row?

THE COURT: Start here and we'll take, we have seven (7) chairs here now, don't we?

THE CLERK: Yes, sir.

[52] THE COURT: The first seven (7), the second seven (7) and then we'll go up this wall over here.

* * *

[At this time, an initial panel of twenty (20) jurors was called to the courtroom and examined on *voir dire* by the Court, Mr. Goad and Mr. Baugh. There was individual *voir dire* of jury panel members as requested. Of that initial panel of twenty (20) jurors, three (3) jurors were challenged for cause by the Defendant and were excused by the Court. Subsequently, seventeen (17) members of the first panel were seated as the venire.

A second panel of five (5) jurors was called to the courtroom and examined on *voir dire* by the Court, Mr. Goad and Mr. Baugh. The first three (3) names that were called of the second panel were free from challenge and were seated to complete the venire of twenty (20) members, free from objection.

The Court stood in recess at that time in order for both parties to review the panel members.

While the list was passed between the parties, [53] the Court read the following preliminary and cautionary instructions to the jury.]

* * *

THE COURT: Members of the jury, at this point, the attorneys are going through the process of striking the jurors. All twenty (20) of you have been found free from objection and qualified to sit on the trial of this case. However, under the laws of the Commonwealth of Virginia, each of these parties will have to strike four (4) names apiece. So twelve (12) of you will end up trying the case. We don't know which twelve (12) that will be, so at this point I'm going to read you the preliminary cautionary instructions which will advise you how the case will proceed and since we don't know which twelve (12) will try it, I request that all of you attend to the reading of these instructions.

The case will proceed in the following order. First, the Commonwealth Attorney may make an opening statement outlining his case. The Defendant may also make an opening statement outlining his case immediately after [54] the Commonwealth Attorney's statement. Neither the

Commonwealth Attorney nor the Defendant is required to make an opening statement.

Second, the Commonwealth Attorney will first introduce evidence. At the conclusion of the Commonwealth Attorney's evidence, the Defendant has the right to introduce evidence. Thereafter rebuttal evidence may be introduced.

Third, at the conclusion of all the evidence, further instructions will be given you, after which the attorneys may make their closing arguments. Then you will retire to select a foreman, deliberate and arrive at your verdict as to the guilt or innocence of the accused.

Faithful performance by you of your duties is vital to the administration of justice. You must not be influenced in any degree by any personal feeling of sympathy for or prejudice against any party to this suit for each party is entitled to the same fair and impartial consideration.

The law applicable to this suit is given to you in these instructions and in those other instructions that you will receive at the close of all of the evidence and [55] it is your duty to follow all such instructions. It is your duty to determine the facts and to determine them from the evidence and the reasonable inferences arising from such evidence and in so doing, you must not indulge in guesswork or speculation.

The evidence which you are to consider consists of the testimony of witnesses and the exhibits admitted in evidence. The admission of evidence in court is governed by rules of law. From time to time, it may be the duty of the attorneys to make objections and my duty as Judge to rule on those objections and whether you can consider

certain evidence. You must not concern yourself with the objections or the Court's reasons for these rulings. You must not consider testimony or exhibits to which an objection was sustained or which has been ordered stricken.

Opening statements and closing arguments of the attorneys are intended to help you in understanding the evidence and applying the law, but they are not evidence.

No statement or ruling or remark which I may make during the course of the trial is intended to indicate my opinion as to what the facts are. You are to [56] determine the facts. In this determination, you alone must decide upon the believability of the evidence and its weight and value. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the suit, the relation of the witness to any parties to the suit, the inclination of the witness to speak truthfully or not, the probability or improbability of the witness' statements and all other facts and circumstances in evidence. Thus, you may give the testimony of any witness just such weight and value as you may determine the testimony of such witness is entitled to receive.

Until this case is submitted to you for your deliberation, you must not discuss this case with anyone nor remain within hearing of anyone who is discussing it. To avoid the possible appearance of impropriety, I strongly urge and suggest to you that until the trial is concluded, you shall not converse at all with anyone connected with the trial as a party, witness, or attorney.

After this case has been submitted to you, you must discuss this case only in the jury room when all [57] members of the jury are present. You are to keep an open mind and you shall not decide any issue in this case until the case is submitted to you for your deliberations under the further instructions of the Court.

Now, that concludes the reading of the cautionary and preliminary instructions. We'll await the striking of the jury.

* * *

[In open court in the presence of the jury panel, both sides struck four (4) members each and a panel of twelve (12) jurors was chosen to hear the case. Those jurors were as follows: Sharon Beasley; Angela Bowman; Sherry Dawn Burnette; Doris Gardner; Donna F. Maldonado; Gary Lyons; Rayborn E. Lyon; James Lowe; Vander Kirkland; Dannie Wayne Martin; Rena H. McAlexander; and Cheryle D. McCraw. They were charged by the Clerk as follows: You shall well and truly try the issues joined between the Commonwealth of Virginia, Plaintiff, and Barry Elton Black, Defendant, and a true verdict give according to the evidence, so help you God? To which the entire [58] panel indicated an affirmative response.]

* * *

THE COURT: Members of the jury, at this point, it is approximately a quarter of twelve (12:00) and we've decided, rather than begin the actual trial of the case which is the opening statements of the attorneys and then the evidence that may be presented with regard to these charges, that we would break for lunch. I'll ask you to

return at a quarter of one (1:00) and we'll try to get started on time.

While you're out, don't discuss the case with anyone. Do not remain within hearing of anyone discussing the case. When you return to the, to the courthouse, if you would come to the, I guess they better come to this room first, come to the courtroom and then we will, the Bailiff will be here to take you back to the jury room and we'll ask you to stay there until the case is ready to be called.

Yes, sir?

MR. BAUGH: Your Honor, would you please inform [59] the jurors that if we see them in the street, Mr. Goad and his attorneys or mine, if we don't speak to them, we're not being rude, but we're not allowed to.

THE COURT: That's exactly right and I couldn't say it any better. We have to, we have to avoid the appearance of impropriety and you might be talking about the weather, but others may not believe that. So if you see us on the street, we're not stuck up and we're glad you're here today. We'll now excuse you until . . .

THE CLERK: Excuse me, Your Honor, but they'll need to wear their badges.

THE COURT: Right. And we'll see you at a quarter of one (1:00).

THE COURT STANDS IN RECESS FOR LUNCH

THE COURT: All right. Both parties ready to begin?

MR. BAUGH: The defense is ready, Your Honor.

THE COURT: Thank you. Commonwealth ready?

MR. GOAD: Yes. I'd make a motion to sequester the witness.

[60] THE COURT: Bring in the jury.

MR. GOAD: I would have a motion to sequester the witness.

THE COURT: All right. I'm a little bit surprised because they're your witnesses, but you're entitled to . . .

MR. BAUGH: I was going to make the motion anyway.

THE COURT: O. K. Anyone going to testify, come forward please. Anyone that's called as a witness in the case, come forward.

MR. GOAD: No witnesses for the defense?

MR. BAUGH: No.

THE COURT: We will, we'll do the oaths individually when the jury's present. While you're out, don't discuss your testimony with anyone and we'll call you as we need you. If you'll wait in the back, they'll show you one (1) of the witness rooms where you can wait until you're called.

(All witnesses in the case are excluded from the courtroom and from the hearing of any of the matters [61] therein.)

THE JURY RETURNS TO THE COURTROOM

THE COURT: We've got an extra seat. That's why it looks like we're missing somebody. All twelve (12) members have returned. You may begin with your opening statement.

MR. GOAD: Thank you, Judge.

* * *

OPENING STATEMENT BY MR. GOAD:

Good afternoon, ladies and gentlemen. As you know from this morning, my name is Greg Goad. I'm the Commonwealth's Attorney for Carroll County and I'm here today to prosecute the case of the Commonwealth versus Barry Black. John McLees is here also with me to work on the case.

The evidence as was mentioned to you earlier today is going to be short, so with the short evidence and [62] the short case that calls for a short opening statement by myself. Now, after I speak, Mr. Baugh will give his opening remarks and then we'll proceed on with the testimony.

I'll have three (3) or four (4) witnesses to present to you in this case. The first witness will be Sheriff Warren Manning. He'll testify that on the date of August 22nd, that he was employed as the Sheriff of Carroll County and that evening when he returned to his home in Woodlawn, he received notification that there was a Ku Klux Klan gathering in the Cana section of our county. He then notified First Sergeant Rick Clark and other deputies and then went down to Cana to see where the gathering was taking place at.

Upon his arrival, he saw on the road or next to the road, excuse me, a four (4) by eight (8) foot sheet of plyboard that said *KKK Meeting* and then you could also see individuals in a field. Now, as I mentioned, this is in the Cana section in the county where the terrain is more flat than it is up here in this section of the county. He remained at the scene along with Investigator Clark and also other deputies, talked to some of the individuals [63] that were having the gathering and then proceeded to stay and observe what was happening.

Now, Roger and Rebecca Sechrist, they lived next to the tract of land where the rally was taking place at. Now, Sheriff Manning will testify that as he stayed there at the scene, along with Investigator Clark, that eventually, as the time went on, that there had been a cross erected on this property and the testimony will be that this cross was approximately twenty-five (25) to thirty (30) feet tall, clearly visible from the public road and also within the area of approximately ten (10) homes.

As they were there making sure that nothing occurred, then as the Klan gathering continued, at this point, they're in white robes and hats, then as part of their ceremony then the cross was burned and it glowed out over the whole area where these homes were at and both Sergeant Clark and Sheriff Manning saw the burning of the cross. Upon doing that, they checked with the dispatcher on exactly what the cross burning statute is in Virginia.

After that, they proceeded onto the property and asked who was responsible for the gathering. The [64] Defendant, Barry Black, came forward and said that he was leader of the gathering and that he was responsible

for the burning of the cross. He was then placed under arrest for violating the statute here in Virginia and Investigator Clark then placed him in his vehicle for a trip to Hillsville to see the magistrate.

Once they were in the vehicle and proceeding to the county jail, Mr. Black began a conversation with Investigator Clark and one (1) of the comments that was stated "when is the white man going to stand up to the blacks and the Mexicans in this neighborhood" and he further went on to say that he had heard that the blacks and whites were holding hands and walking down the sidewalk in that area.

Well, Investigator Clark told him that there were not any sidewalks in Cana, Virginia and Mr. Black said that he had been mislead. And they brought him on up to the jail and he was processed and then he later, we proceeded on with the case we're here today on.

Now, Rebecca Sechrist and possibly Roger Sechrist will testify that they are neighbors that own the property adjacent to the rally, as I mentioned to you [65] before, and she will tell you and possibly Roger about how the effect of this Klan rally and the burning of the cross had on them.

At the conclusion of the case, I'm confident that you'll see that we have proved beyond a reasonable doubt that Mr. Black burned the cross with the intent to intimidate. Thank you.

* * *

THE COURT: Mr. Baugh?

MR. BAUGH: Thank you, Your Honor.

* * *

OPENING STATEMENT BY MR. BAUGH:

May it please the Court, counsel. It's not illegal to burn a cross in Virginia. It's illegal to burn a cross with the intent to intimidate others, to place them in fear of immediate or imminent serious bodily injury or death. There is the difference. I want to [66] point out first, however, that every person, if any citizen doesn't like something in our nation, if you don't like blacks and whites holding hands, if you despise Rush Limbaugh, that's my personal favorite, you have a right to say it. You have a right to express it. You can't say it in a way that makes other people think they're going to be hurt, but you have the right to say it.

The fact that the government comes in here and says that this man told a deputy that he doesn't think blacks and whites should hold hands, that's his right. If he doesn't want to hold my hand, I don't care. that's [sic] his right because he's a citizen.

One (1), they also didn't tell you that in addition to Mr. Black being down here, there was a sign up telling people that there was a Klan rally and that it was private and that outsiders would not be tolerated. You couldn't come in. It wasn't open to just anybody, so it was a warning sign.

Additionally, I want to agree with something counsel has said – the cross was burned and I believe he said as part of their ceremony and that was why it was burned – not to intimidate others, not to make other [67] people think they were going to be jumped and beaten but because, for whatever reason, it is part of their ceremony and that was the reason. And if you believe what Mr. Goad said, then it's going to be a real short trial.

Now, Mr. Goad has said that he has witnesses who will testify about the effect of the cross burning on them. You will hear the Judge tell you that the key here is his intent. If he did not intend to communicate a threat of imminent bodily injury, if other people feel threatened, that doesn't matter under our law. It is his intent that makes it a crime. If someone comes along who is very susceptible or very frightened, that is not a criteria. That is irrelevant.

The only issue is when he burned that cross or the cross was burned – now, I'm not even going to say he didn't burn it, here's why – because if you burn it or you cause it to be burned, you're, you're, you did it yourself. In fact, under our law, if you aid and abet someone, if you know someone else is doing an illegal act and you help them in any way, shape or form – give them a match – you've done it yourself. So it doesn't matter whether he lit it or he was there – it doesn't matter.

[68] The issue is very simple. When that cross was burned by whoever burned it – either it was Mr. Black or someone else in his group – did he burn it with the intent to put other individuals or a group of individuals in fear of imminent bodily injury or death. Period.

It's not did he stand up and say I hate you. It isn't did he shout the words. It isn't did he hold up a flag. It isn't did he demonstrate I just, I don't like certain people. It isn't a question of does he have a right to have this ceremony. The only issue is when he burned it, was he threatening people.

And in evidence of that, you can look at not only what was done, but how it was done. By their own admission, it was done hundreds of yards from the road surface and I

would submit to you that certain words can carry a threat or certain gestures can carry a threat, but the distance – it's one (1) thing for me to sit back here and say I don't like you – it's another thing to get up in your face, I don't like you. That's different. That might be construed as threatening and maybe by my behavior I intend to communicate a threat. That was not his behavior.

[69] The reason I keep talking is the issue is so simple, it's scary. Simple issues bother lawyers. This is a simple issue.

So I think at the conclusion of the evidence Mr. Black has the right to express by sign or gesture any feelings he has. That's his right as a citizen. And even if you disagree, you have sworn an oath to God to follow the law and the law says we must protect his rights. We can't protect his right to intimidate people intentionally.

I will submit at the conclusion of the government's evidence that you will find that there was a cross burning. You will find that maybe people, some of you included, might be uncomfortable by that – just like you'd be uncomfortable if the Black Muslims had a meeting or I'd be uncomfortable if Rush Limbaugh had a meeting. If these people come together and they say things that make us uncomfortable, we don't have a right to be free from discomfort. That's the disadvantage of living in a democracy. You have to tolerate other people's rights.

So they're going to have evidence that some people might have been uncomfortable. They're going to [70] have evidence a cross was burned. They're going to have evidence that people drove by – some people might have even been frightened. But there's going to be no evidence, direct or circumstantial, that he did it with the purpose of

making people feel that they were in imminent threat, a real threat of injury or death.

And I would submit no matter how you feel about the Klan, no matter how you feel about cross burning, you took an oath as a juror to follow the law. And if you follow the law, you will find there is no evidence of intent to intimidate others.

And then comes the hard part. You're going to have to follow the law and by your verdict say that what he did, even if you don't agree with it, is legal. Just like soldiers have to go to war to defend the nation and our principles, you're going to have to do the same and it's not meant to be easy, but if you follow your oath, I will submit you will find the Defendant not guilty.

Thank you.

* * *

[71] THE COURT: Thank you. Call your first witness.

MR. GOAD: Sheriff Manning.

* * *

SHERIFF H. WARREN MANNING, first being duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION BY MR. GOAD:

Q State your name please.

A H. Warren Manning.

Q And what's your position?

A I'm the Sheriff here in Carroll County.

Q And were you serving as such on August 22nd of 1998?

A Yes. I was.

Q And did you receive a report about a Klan gathering in Carroll County on that date?

A Yes. I came home about six thirty (6:30) that evening and had a note on my door saying that [72] there was a rally, KKK rally in Cana, Virginia.

Q Right.

A And so I called my office and they told me that they had information that there was a rally going on in Cana. So I told them that I would be on my way down there.

Q And you live in the Woodlawn community?

A Yes.

Q And so after you received the report, what did you do?

A Well, I called my officers that was working to meet me on Brushy Fork Road on 690 in Cana.

Q Is that in Carroll County, Virginia?

MR. BAUGH: We'll stipulate venue, Your Honor.

THE COURT: Thank you.

A Yes. It is.

Q All right. Go ahead.

A O. K. When I arrived there, I seen a four (4) by eight (8) sheet of plyboard said *KKK Rally*.

Q Do you know about what time you got there?

[73] A Approximately probably seven (7:00), seven fifteen (7:15).

Q O. K.

A Since I seen the sign, I wanted to make sure that everything was legit and I wanted to get their attention. I could see people out in the field. So I pulled off the side of the road and I turned my blue lights on and I might have flipped my siren on for just a second so they could see me and three (3) gentlemen approached me up in a vehicle.

Q And, if you would, describe the lay of the land in this area of the county.

A Well, it was a big open field.

MR. BAUGH: Excuse me. I don't mean to cut the witness off, Your Honor. We're willing to stipulate to the admissibility of the photos they have and I believe they might be more illustrative than the description if counsel wishes to introduce them at this time or in conjunction, I have no objection.

MR. GOAD: O. K. Officer Clark took the photos, [74] but . . .

MR. BAUGH: I don't mind.

MR. GOAD: I have four (4) photos.

THE COURT: All right. We'll, Commonwealth's Exhibit #1, #2, #3 and #4.

MR. BAUGH: That will be fine. No objection to the introduction. No objection to the publication to the jury.

THE COURT: All right.

MR. BAUGH: They've been previously tendered.

THE COURT: You may proceed.

Q Sheriff, I have Photos #1, #2, #3 and #4. If you could, tell me what those photos show.

THE COURT: For the record, they'll be received as marked and you may proceed.

COMMONWEALTH'S EXHIBIT #1, a photograph of the scene of the rally in Carroll County, Virginia, is received and filed as a part of the Court record in this case.

[75] COMMONWEALTH'S EXHIBIT #2, a photograph of the scene of the rally in Carroll County, Virginia, with a mark at the approximate placement of the cross, is received and filed as a part of the Court record in this case.

COMMONWEALTH'S EXHIBIT #3, a photograph of the scene of the rally in Carroll County, Virginia, with a mark at the approximate placement of the Sheriff's car, is received and filed as a part of the Court record in this case.

COMMONWEALTH'S EXHIBIT #4, a photograph of the scene of the rally in Carroll County, Virginia, is received and filed as a part of the Court record in this case.

Q Is this showing the area where the rally was?

A Right. As I . . .

Q Now, if you could, and with the Court's permission, approach the jury and show them the photos to let them see.

[76] THE COURT: All right. And would you refer, refer to the number on the photo as you testify please?

A O. K. I'll start with this one (1) first, #3.

THE COURT: All right.

A As I came down, heading this way, from this end, somewhere in this area, in this area, there was a sign right on the side of the road here, a four (4) by eight (8) sheet of plyboard that said *KKK Rally* and I stopped right in here and I could see people over in this area of the field.

MR. BAUGH: Sheriff, not everybody down here can see at the same time.

A I stopped right here and there was a four (4) by eight (8) sheet of plyboard right here. I could see people moving and I could see a congregation of people here. So I stopped here to try to get their attention to come out to the road so I [77] could talk to somebody.

Q Was it still daylight at that time?

A No. I think it was pretty well dark at that time.

Q O. K.

A O. K. #1 here, let's see, #2, right here is a picture of a house beside this fence here. This is the field that we're talking about with a, should I go on and say what was in the field here? Is that what you want?

Q Uh-huh.

MR. BAUGH: No objection.

Q Yes.

A O. K. The cross was here, somewhere in the, somewhere in this area right here and I was back up here, the picture don't show. But that's where the cross was located.

MR. BAUGH: Your Honor, could I ask the witness to mark in pen on the photograph the location of the cross [78] where he recollects it being?

THE COURT: That will be appropriate. You may do so.

Q And indicate which photo you're marking on, too.

A O. K. This is #2. O. K. Do you want me to mark where I was parked at, too?

MR. BAUGH: Wherever. If you think it's necessary to illustrate, I have no objection. In fact, I'd ask you to.

THE COURT: This is a different exhibit? What exhibit are you marking this on?

A #3.

THE COURT: Going back to #3?

A Yes, sir.

THE COURT: Mr. Baugh, would you inspect those and make sure that we can see those marks? Would both of [79] you inspect?

MR. BAUGH: Yes, Your Honor.

Q In a couple of these photos, there's a residence in the picture. Do you know whose home that is?

A O. K. #1, this is the Sechrists', Roger Sechrist and Rebecca Sechrist.

Q And they live next door to . . .

A This is where their fence is here, their field. This is their house and the cross was here. Everybody see it? Did you see that?

MR. BAUGH: Your Honor, I have no objection to the exhibit being passed to the jury at this time. In fact, I'd ask that it be passed to the jury.

THE COURT: Do you want to publish those to the jury now?

MR. GOAD: Yes.

THE COURT: O. K. I believe we can go on with the evidence while they're looking at the exhibits. Any objection to going forward from either one (1) of the parties?

[80] MR. BAUGH: None from the defense, Your Honor.

THE COURT: All right. You may proceed.

Q All right. Let's pick back up where you first turn on your blue lights and hit your siren to get their attention.

A O. K.

Q What did you do after that?

A O. K. I was wanting somebody to come over so I could ask them some questions about what was going on and three (3) men approached me with white robes and they come up to my door of the car and I don't think I even got out and I asked them was this a legit KKK rally and he said it was.

Q Did they have hats on?

A Yes.

Q O. K.

A They, I asked them how long it was going to be until their rally was over and they said it probably, it will be another hour, somewhere in that neighborhood, hour and a half until they [81] finished their rally up.

Q Now, was Mr. Black one (1) of those gentlemen?

A At that time, I didn't know Mr. Black.

Q Right.

A But, you know, positively completely sure of it, I'm not for sure.

Q O. K. All right.

A There was just three (3) gentlemen approached my vehicle.

Q All right.

A So I told them, I said I would be around to make sure everything went well and make sure everything was, you know, law-abiding and see the rally through and I was going to stay in the community. So they went back to the rally and I went off from, where I showed you I was parked

at and just went out past the double-wide and pulled off to the right.

Q All right. Now, what did you do after you went back up there?

A. O. K. My officers and I, I had them patrolling the roads and then they was coming up sitting [82] beside me and just observing what was going on in the field. There was cars coming by me and a few cars stopped and asked me what was going on and I told them what was going on.

Q Now, were there any speeches being made during the rally?

A I could hear talk and people talking, but I couldn't tell what they were saying.

Q O. K. All right. Continue.

A O. K. Approximately probably forty-five (45) minutes to an hour we was out there and I seen a light on the lighting of a cross, burning of a cross.

Q Describe that for us and how that was done.

A Well, I was sitting there and I thought it was about over with and I seen people gathering around the cross and then all of a sudden it went up in a flame and they circled the cross.

Q And how tall was the cross?

A My estimate, estimate was twenty-five (25) to thirty (30) feet.

Q And I believe you said you were on a state road?

[83] A Yes. I was sitting on the side of the state road.

Q Clearly within your view?

A Yes.

Q Now, were there any other homes in the area?

MR. BAUGH: Objection to area, Your Honor. That's an indefinite term.

Q Within sight of the burned cross.

MR. BAUGH: No objection. Withdrawn.

A Somewhere in the neighborhood between eight (8) to ten (10) houses.

Q O. K. Now, what did you do after the cross was burned?

A My First Sergeant, Rick Clark, was with me and we called our office. I let him call the office to check the law book to see if there was, I wasn't familiar with the law on the cross burning and my office called me back and advised [84] me that there was a Code section of violation of burning a cross.

Q And what did you do after you received that report?

A O. K. Then I told, First Sergeant Rick Clark and myself, I said we need to go down there and find out what, you know, find out who's responsible and explain to them that they cannot do this in the State of Virginia.

Q Right. And so did you go into the field where the meeting was?

A Yes. I went down the driveway to the double-wide and back around to the fence. Now, the fence shows in the picture. There wasn't a major fence like that at that time. There was just a line kind of where you could tell the difference in the property lines.

Q Right.

A This fence was built after this happened.

Q These are more recent photos?

A Right.

Q Right.

[85] A And I went down to the rally and, of course, the people at the rally, you know, wanted to know what I was coming down for and I asked them, when I got out of the car, I asked them who was the leader of this rally . . .

MR. BAUGH: We're going to object to any statements made by others other than the Defendant under the Sixth Amendment confrontation clause.

THE COURT: Mr. Commonwealth?

MR. GOAD: I won't be offering any of that through Mr. . . .

THE COURT: Then you withdraw the question?

MR. GOAD: I'll just ask him to focus in on the Defendant.

THE COURT: All right.

Q Did the Defendant approach you when you first asked the question?

A Yes. He did.

Q And is that Mr. Black sitting over there?

A Yes.

[86] Q And did he still have the robe and the hat on?

A Yes.

Q All right. And what was your question?

A I asked him who's the head of this rally and he said I am.

Q And when you're saying who, he?

A Mr. Black said.

Q O. K.

A And I asked him if he, who was responsible for burning the cross and he said I guess I am because I'm the head of the rally and I said well, there's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this and my First Sergeant, Rick Clark, was there and I took, took him to Rick Clark and he proceeded to arrest him and put him in his car.

Q O. K. Now, did any individuals at the scene seek assistance or protection from you while that was going on?

A When I was there talking to Mr. Black and right after the First Sergeant took Mr. Black over to [87] his car, neighbors in the double-wide came up to me and it, they was real, had this fear on their face . . .

MR. BAUGH: Objection, Your Honor.

THE COURT: Sustain the objection.

MR. GOAD: He can testify to what he saw.

MR. BAUGH: He cannot . . .

MR. GOAD: To their facial expression.

THE COURT: Sustain the objection.

MR. BAUGH: Thank you. Ask the jury be instructed to disregard.

THE COURT: So instructed.

MR. BAUGH: Thank you, Your Honor.

THE COURT: Members of the jury, disregard the last comment.

Q Did they seek protection?

MR. BAUGH: Objection, Your Honor, unless there's a basis and it gets dangerously close to confrontation. If the people are here, they can testify [88] to what they came and asked for.

MR. McLEES: Your Honor, it's not a hearsay situation. It's a verbal act on their part if they came to him and asked for protection. He can, he can tell what they said because it's a verbal act. It's not offered for the truth of the matter.

MR. BAUGH: I'm not objecting at this time to being double teamed, but I will next time. Your Honor, there are some, in grammar, there are some words which do not carry with them a question. They do not carry with them a declaration. The statement that he asked clearly calls for a declaration and that would be violative of the Sixth Amendment right to confrontation. If they're here, they can testify. It is a hearsay exception and, more

importantly, it's a confrontation exception and a confrontation objection.

THE COURT: Anything further you want to add?

MR. McLEES: The confrontation clause is not violated by the traditional firmly rooted, common law hearsay exceptions and this is one (1) of them.

THE COURT: Sustain the objection.

Q Answer anything Mr. Baugh might have.

[89] CROSS EXAMINATION BY MR. BLACK [sic]:

Q Sheriff Manning, on this sign announcing the rally, did it say words on it like it was private or anything like that? Do you remember the words that were on it?

A The best I can recollect, it did have *private*, I believe, on that sign.

Q O. K. During the time you were out there, sir, the hour and a half before the cross was lit, first, did you see the cross erected? Did you see it standing there?

A No. It was dark and I really didn't see until it was, until they set it on fire.

Q I thought – and correct me if I'm wrong – that you said that you saw them circle the cross, they got around the cross and then you saw the cross lit, but you, I believe you said you saw them circle the cross first.

A Well, at the time, I seen them circle, but I [90] didn't, my mind wasn't focused on the burning of a cross at that time.

Q You were familiar with the fact – am I correct, sir – that a cross burning is not, it's not a disassociative thing with the Klan? I mean, that sort of thing happens in Klan rallies. Right?

A Right. But we've never had one (1) in Carroll County.

Q O. K. And during that hour and a half, did you ever think, well, let me ask you this, did you know it was a crime during that hour and a half you waited to burn a cross?

A No. No. Not until I called my office.

Q And that's how come you didn't tell them it's a crime to burn a cross because you didn't know?

A That's right.

Q All right. Did the members of this rally do anything in contravention of your orders or directions during the time you were there? Did they, were they difficult with you?

A No.

[91] Q Whose field is that in which the cross was burned?

A I'm not for sure the lady's name, but it was Joey Sechrist's mother.

Q And had you had, had you had any complaints about trespassing or any allegation that the Klan people were there without permission?

A No.

Q All right. So your investigation indicated they were there with permission?

A Yes.

Q All right. And they stayed on the portion of the property for which they had permission?

A As far as I know.

Q All right. Now, during the whole time you were there, were there any, were there any members of the gathering dressed in their sheet things?

A Was there any more than Mr. Black?

Q Uh-huh. Anybody?

A Everybody was.

Q All right. And weapons on the part of them?

A I did not search anybody but Mr. Black.

[92] Q Did you see any weapons out there?

A I did not see no weapons.

Q Did you see any overtly threatening gestures or signs?

A No, sir.

Q Did you feel, well, let me ask you this. Do you agree with the views of the Klan?

A No.

Q Did you perceive what was going on as a threat of imminently bodily injury to you? Did you feel you were going to be attacked?

A By the burning of the cross, is that what you mean?

Q Uh-huh.

A Just by the actual burning of the cross?

Q Uh-huh.

A It, not maybe by the actual burning of the cross.

Q Thank you. Well, we're here about the burning of the cross, aren't we? That's the reason we're having this iittle party. Right? You have to say yes or no, sir.

[93] A I didn't catch the question. Say it again.

Q O. K. The reason we're here, the reason he was arrested was about the burning of the cross. Right? It wasn't about wearing the percale and walking around and all that.

A Just burning the cross. Yes.

Q O. K. Thank you. Pass the witness.

AND FURTHER THIS WITNESS SAID NOT.

MR. GOAD: No additional questions.

THE COURT: Are you going to recall?

MR. GOAD: Possibly.

THE COURT: We'll need for you to wait then in one (1) of the outer rooms. Don't, don't go back in the same room with the other witnesses and don't discuss your testimony.

[The witness, Sheriff H. Warren Manning, is again excluded from the courtroom and from the hearing of any of the matters therein.]

[94] THE COURT: Next witness.

MR. GOAD: Judge, I would request a conference in chambers for a brief moment on a matter.

THE COURT: All right. Let's go to chambers and the Defendant is welcome.

* * *

IN THE COURT'S CHAMBERS – OUT OF THE PRESENCE OF THE JURY

[Present are the Court, the Clerk, the Court Reporter, Mr. Goad, Ms. Collins, Mr. McLees, Mr. Hurd, Mr. Baugh, Ms. Davis, and the Defendant, Barry Elton Black.]

MR. GOAD: Judge, in the opening statement of counsel, he stated that the intimidation, intent to intimidate others required an imminent threat of injury or death and he again asked that question on cross examination of Sheriff Manning and it's our position that's not the accurate description on what is an intent to intimidate. There had been some discussion about this on the jury instructions and Mr. Baugh forwarded one (1) [95] to me previously which we were not going to object to which did not contain the threat of, imminent threat of injury or death and then yesterday we received some new ones that did and it's our position that that is not an accurate statement of the intent to intimidate and with that being in the opening and then on cross examination with the Sheriff, I felt like we ought to address that now.

THE COURT: What do you have to say?

MR. BAUGH: I didn't hear an objection. I don't know what I'm answering to. Did I say it? Yes. I don't know what I'm, what do you want to know?

MR. GOAD: I'm objecting to anything further.

MR. BAUGH: Your Honor, I said it about six (6) times during *voir dire*, at least ten (10) times during opening without objection, if the Court's going to rule we can't do that after we opened with it and we've *voir dired* on it, we'll move for a mistrial now because I can't change tactics in the middle of a trial.

THE COURT: What did you say in your briefs? Wasn't, do you have a copy of your brief that you filed? Wasn't that . . .

[96] THE CLERK: Do you want the Court file?

MR. GOAD: I do on my desk.

THE COURT: O. K. Could I see the briefs? I thought that was one (1) of the things that you said in your, in that brief.

MR. McLEES: Your Honor, we said that the intent to intimidate involved a, putting people in fear and I think we said in fear of injury. We don't have any problem with that. I think our objection is with Mr. Baugh's gratuitous injection of this element of fear of imminent danger. It doesn't have to be imminent danger. The law doesn't, the statute doesn't say that and the Constitution doesn't require that.

MR. BAUGH: Your Honor, we have two (2) new cases. The reason I didn't do them earlier – in completing

the instructions, in the instructions I filed on June 10th, as per your direction, I did use the word *immediate* which I take as analogous to *imminent*. Additionally, I did submit – we had some faxed, I left, I forgot them and I had, and Mr. Goad permitted me to have them faxed over to his office for delivery to me – there is a new case or cases that were referred to us by the [97] Jefferson Institute at the University of Virginia – one (1) is called *Baker*, the other one (1) is, was it *Hefler*? H-E-F-L-E-R. I have copies in my briefcase.

MS. DAVIS: *Kessler*.

MR. BAUGH: Was it?

MS. DAVIS: That's the case – *Kessler*.

MR. BAUGH: *Kessler, Kelfer*, something like that, and I have copies. Both of them say that in order for it to be, to intimidate, there must be a, quote, "*true threat of imminent bodily injury or death*" in order, to escape the protection of the First Amendment. I mean, as the Court is well aware – just saying I hate people isn't enough. It must be calculated.

It's like the yelling of fire. It must be calculated to elicit a reaction at that time and it is the prevention of the action occurring which takes it outside the First Amendment. To just make a statement that somewhere way down the road may cause a reaction, to scream fire in an open field, for instance, is not a violation of the First Amendment.

The same thing here, it has to be imminent. It must be a threat of serious bodily injury and I believe [98] the government conceded some of that issue in their brief.

THE COURT: Give me a minute while I find the brief . . .

MR. BAUGH: Yes, sir.

THE COURT: Let me have some comment with regard to the Commonwealth's statement in the Brief in Opposition, this language appears: "*The Virginia statute at issue outlaws*", this is emphasized, "*threats of violence, not mere incitement to violence or fighting words*". Then it goes on and "*Black now unreasonably pounds his figurative fist at Brandenburg vs. Ohio*", et cetera, "*which involved an attempt to outlaw advocacy of lawless actions of others rather than direct threats. He cavalierly ignores the abundance of authority that direct threats of violence, unlike mere advocacy, are outside the First Amendment*".

Aren't you saying that we need the – in your own briefs – that you need the direct threats?

MR. McLEES: We're saying it needs to be something that expresses a direct threat, but not a threat of imminent harm. The imminence is what we object to here. He's trying to get in through the back door what he [99] couldn't through the front door. He argued over and over again that it was this clear and present danger test. Your Honor correctly ruled the clear and present danger test is not involved in this kind of statute.

One (1) can violate the law by threatening future harm. It doesn't have to be imminent harm. We've got not only this statute in Virginia. Your Honor knows we've got a statute that makes it a felony to communicate a threat to burn a building by the telephone. Now, if you call somebody on the telephone and say I'm going to burn your house in the next county, there's not an imminent threat

involved, but that is still, there's not an imminent, you don't have to show an imminent danger to show that that is a felony to communicate that threat. You can say I'm going to burn it next year.

There is a, it is a felony to extort people with the suggestion that if they don't do what you want them to do, you're going to accuse them of some kind of heinous crime. That doesn't have to be a statement that you're going to do it right now or that the harm to them is going to be imminent. There are all sorts of different ways of intimidating people, of threatening harm – now, in the [100] future, to them, to somebody else. All the law requires is that the Defendant's intent be serious – that he actually intend to frighten people with this expression of threat. It doesn't require that it be imminent danger and it doesn't require that he have the actual capacity to carry through on the threat. It's just the intimidation of some sort of threat of harm.

MR. BAUGH: Your Honor, briefly, and I think this might resolve the issue. I'm citing from another case I've not tendered, but I will be glad to, *U.S. vs. Baker*, which is 890 Fed Sup 1375, Eastern District of Michigan, 1995, but I'm referring to the quote in *Brandenburg* which you just indicated they cited. Quoting from *Brandenburg vs. Ohio*, which is 395 US 444, reading from Page 447, "*The constitutional guarantees of free speech and a free press do not permit a state to permit or prescribe advocacy of the use of force or of law violation except where efficacy is directed in inciting or producing imminent lawless action and it's likely to incite or produce such action.*"

Further, if you read on in the case, you'll see the other thing about true threat, the whole case, at the [101] top of

the column over here, true threat, what it means, true threat means serious bodily injury and I will give the highlight, this is a quote from *Brandenburg* which they cited in their brief and it clearly says it has to be imminent.

MR. McLEES: Your Honor, *Brandenburg* is a fighting words case. It's back, he's trying to get in the back door what Your Honor has already rejected through the front door. This is not a statute against advocacy of violence or advocacy of overthrowing the government. This is a statute against trying deliberately to actually scare people. So the *Brandenburg* language quoted in that case is not involved here.

Now, Mr. Baugh has not graced us with the *Baker* case. He hasn't graced us at all with the *Kessler* case that he mentioned. I have no idea what that is. The only reason we know about the *Baker* case is because that he, he submitted to Mr. Goad this jury instruction which is incorrect which has the *Baker* case incorrectly cited at the bottom of it and I called my office and they found the correct cite and faxed me the case.

It appears to me, from what I've been able to [102] glean this morning, a Sixth Circuit case involving a federal statute with Sixth Circuit case law on it. That is not good law in the Fourth Circuit. It's not good law in Virginia. If Your Honor were to adopt this standard here, then not only is this statute unconstitutional, but the telephone threat statute would be unconstitutional, the extortion statute would be unconstitutional. It simply is not a requirement – when someone is actually expressing a threat and seriously trying to scare people, it is not a requirement that it be an imminent danger, that the

person be and put in fear that they're going to be hurt right now. It could be some time in the future in some other place.

THE CLERK: Is this what you're looking for?

THE COURT: Is it Commonwealth's?

THE CLERK: No. That's Mr. Baugh's.

MR. BAUGH: That looks like my response, Your Honor.

THE COURT: I'm really looking for the Commonwealth's . . .

THE CLERK: Oh, I'm sorry. I thought you were looking for his.

[103] THE COURT: No. Let me look again. In your, in the Commonwealth's brief, we have this, this additional language: "*Intimidation as used in such statutes means putting one (1) in fear of bodily harm*", now, this is what you've agreed to, this is your, your memo in stating that it's not vague and it's not overbroad.

MR. McLEES: We do agree to that, Your Honor.

THE COURT: "*Moreover, even if the English language permitted a broader interpretation for the word intimidating, principles of statutory construction would require this Court to construe the word narrowly, as stated above, and thus uphold the constitutionality.*" I believe that's the only thing . . .

MR. McLEES: We do, we do agree to that, Your Honor. The entire controversy here is over his use today of the word *imminent*.

THE COURT: I understand that.

MR. McLEES: And where he's going with that, of course, is that he's going to say well, there's no threat of imminent harm because there was nobody there at that point that they were, that they were about to assault and he's already started down that road and that's not the [104] standard. If the, the black family in the car drove past this, this burning cross and saw it and got frightened and sped away because they, they were frightened of it and it frightened them that some future harm might come to them because this is building up racial animosity in this county, that's sufficient to show intimidation, but he's going to say it's not. If people, if the word is spread throughout the community as a result of this that there's an active KKK chapter in Carroll County and you better watch your step and not walk down the street holding hands with somebody of a different race, that's intimidation, but he's going to say it's not. And that's not the law.

MR. BAUGH: Your Honor, if the Commonwealth is asserting that the purpose of this statute is to forbid racial animosity, I will gladly take that record to the Supreme Court. It is illegal to try to outlaw animosity and that is what he's arguing. Your Honor, in order for you to rule the way they just said, you must knock out the imminence requirement of *Brandenburg* and you must knock out the language of their own brief concerning bodily injury and unless you're willing to deny *Brandenburg* which is U.S. Supreme Court – and, by the way, Sixth Circuit [105] did, I mean, we did cite, that was a Sixth Circuit case and I provided it to the Court only for direction because of the, some of the questions in the statute – but if the Court is going to rule that *Brandenburg* is not the law and the government, and I cannot rely on the

government's representations in its brief, then we're still going to have to, we're going to have to continue the case and declare a mistrial, but I would submit the Court cannot overrule *Brandenburg* and their assertion, the government's assertion in that brief concerning the requirement of bodily injury, the, the interpretation to require that is valid and that is what I have argued – *Brandenburg* and the assertions they have made in their brief.

MR. McLEES: Your Honor, we're not going back on our brief one (1) iota. It requires a threat, it requires intimidation, but it doesn't have to be imminent and *Brandenburg* has nothing to do with this case because this is not a fighting words case. This is not a case where he's being prosecuted for advocating a point of view. It's a case where he's being prosecuted for trying to scare people.

But we don't have to show that he intended to [106] make people think that they were going to be subjected to violence in the next five (5) minutes and that's what he's trying to plant in the jury's mind. He's trying to mislead them.

THE COURT: The Court's going to sustain the objection. I had overruled the clear and present danger test and I think that's what we're getting into when you talk about imminent danger. It has to be a threat of violence, but the imminence – as if it's going to happen in the next five (5) minutes or the next hour – I don't think that's a requirement.

MR. BAUGH: I'll move for a mistrial. I can't change. I've already voir dired this jury and questioned on it.

MR. McLEES: Your Honor, he misstates the law three (3) times and we call him on it on the fourth one (1) and he thinks he's entitled to a mistrial? With all due respect, it's nonsense.

THE COURT: I'm going to deny that motion. No need to argue that. Motion for a mistrial is denied.

MR. BAUGH: Your Honor, I believe that the government has waived their objection.

[107] MR. McLEES: We have not.

MR. BAUGH: They have correctly stated the purpose of this advocacy is to outlaw racial animosity. We told you earlier that was the purpose of this statute. They have acknowledged it. Your Honor, you sat in, if they had objected, we would not be in this posture. They didn't.

I am still of the opinion that under *Brandenburg* – and you can't say that language is not there – I'm still of the opinion, I have always been of the opinion that that is the law. Now, they didn't object. They have to eat it.

I move for a mistrial. It can't be cured. How are you going to cure it, Judge?

THE COURT: I'm not going to try to cure it.

MR. McLEES: There's nothing to cure.

THE COURT: I'm going to deny the motion for a mistrial. We will go forward and we'll, we'll try this case and see what happens.

MR. BAUGH: Your Honor, I have to know, I have to know the direction then. If you're going to permit them to say that the earlier assertions upon which I made

[108] my argument are unfounded, then you have just negated opening. Shall we start again?

THE COURT: They can, when the time comes, if we get this far, when the time comes to get the instructions ready, they can argue to that jury that the Court's instructions are as follows and this is the law of the case. What, I'm not going to permit them to argue to the jury that you misstated the law in your opening statement. The law of the case is whatever the Court tells the, tells this jury the law is when I get to that point. Now, I'm not going to let you criticize his assertion of what the law was at the opening statement.

MR. McLEES: We have no objection to that.

THE COURT: It was probably objectionable. When you try to tell the jury what the law is in your opening statement, you run the risk that the Judge may not agree with that.

MR. BAUGH: Well, that someone might object.

MR. McLEES: That's exactly right.

THE COURT: That's right. Someone can always object and we can get it straightened out right then. That's the Court's ruling. Let's go finish our evidence.

[109] * * *

IN THE COURTROOM – IN OPEN COURT

BAILIFF: All rise.

THE COURT: Thank you. Just be seated please.

Call your next witness.

MR. GOAD: First Sergeant Rick Clark.

* * *

FIRST SERGEANT RICHARD C. CLARK, JR., first being duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION BY MR. GOAD:

Q State your name please.

A Richard C. Clark, Jr.

Q And what's your position?

A I'm a First Sergeant employed by the Sheriff of [110] Carroll County.

Q And were you serving as such on August 22nd of last year?

A Yes. I was.

Q And were you called upon by the Sheriff to go to the Cana section of the community?

A Yes, sir. I was.

Q And what was the purpose of that?

A I was called by radio and told to meet the Sheriff on Brushy Fork Road which is State Road 691 in the Cana section of Carroll County. When I arrived there, I met him at a store, an abandoned store and he told me that there was a meeting of individuals that he wanted us to watch and to be in the area.

Q And did you see individuals in that area?

A Yes, sir. He instructed me to patrol up and down the road, from north to south. As I started back on the road, there were two (2) people in white robes and pointed hats standing on the side of the road beside a sign that said *KKK Rally*.

[111] Q Do you recall if the sign said anything else on it besides . . .

A No, sir. I don't.

Q All right. And what did you do at that time?

A I continue to patrol up and down the road. At one (1) point, we went to the, it would have been the northwest side of where they were at and we started watching where they were at – they had gathered around a cross. I called the dispatcher and that – I knew that there was a cross burning statute, but was not familiar with it – I called the dispatcher and asked him to look up the Code Section and to call me back and read the Code Section to me when he found it.

Q Can you tell us how many people were at this gathering?

A It appeared to be twenty-five (25) to thirty (30).

Q And were they all dressed similar?

A Yes, sir. They appeared to be.

Q And what did they have on?

A White robes and white hats.

[112] Q And so what did you do after you received your radio report back about the statute?

A Prior to him calling me back, they had been standing around a cross that was in an open field. They moved in unison to the cross and lit the cross and it was flaming. He called me back and read the statute. When I told the Sheriff what the statute was, he instructed me to go with him across the field where we went forward toward the group. He asked who was in charge and Mr. Black came forward and indicated that he was.

Q Right.

A We placed Mr. Black under arrest for burning a cross.

Q And what did you do after that?

A I took him back to my police vehicle. I searched him and placed him into the vehicle and I was instructed by the Sheriff to bring him back to the jail to complete the arrest process.

Q Right.

A To do so, I had to travel back to State Route [113] 691 where we had general conversation all the way back up the road. He spontaneously, as we approached Route 691, said *when is the white man going to stand up to the blacks and Mexicans in this area*. I asked him to clarify his statement and he told me he was lead to believe that the blacks and Mexicans were walking up and down the sidewalk with white women holding hands and taking all the jobs.

Q Right.

A I told him there weren't any sidewalks in Cana, Virginia.

Q Uh-huh.

A And he said he'd seen it that afternoon. I told him there weren't any sidewalks in Carroll County, Virginia in the Cana section and he indicated, I understood that he had stayed in the Mount Airy section where there are sidewalks and he seemed surprised that he was in Virginia.

Q Right.

A We talked all the way back up the road to the jail. It took fifteen (15) to twenty (20) [114] minutes at that time of night, but when I got to the jail, I completed the arrest process and took him before a magistrate.

Q O. K. Now, did any individuals drive by while you were observing the gathering?

A State Route 691, there was a normal flow of traffic. Some people would drive by and holler out the window. There was a black family that drove by. They stopped and took off. Probably, in the hour that I was there, there was probably forty (40) to fifty (50) cars came by.

Q Now, when you say stopped and took off, what do you mean by that?

A Stopped and looked across the field and then they took off.

Q Was the cross burning at that time?

A Yes, sir. It was.

Q And how tall was the cross?

A Twenty-five (25) to thirty (30) feet.

Q And what type of distance did you see the glow of the cross go?

A We were standing probably three (300), three [115] hundred (300) to three hundred and fifty (350) yards away.

Q Right. Clearly visible from where you were at?

A That particular stretch of road's probably three-fourths of a mile and you could see it, one (1) end of the road cuts left and right, down a hill and up a hill, one (1) end of the road goes down a hill, you could see it from both ends of the road. It was probably visible at that particular point a half mile in each direction.

Q Right. When you talk about this family stopping and taking off, are we talking slowly, quickly or what?

A When they came up to us, the Sheriff had his blue lights on because we were on the side of the road.

Q They slowed at our location. When they found out that we didn't want anything, they appeared to be upset and took off.

MR. BAUGH: Objection to *appeared to be upset*, [116] Your Honor. That is improper. We ask the jury be instructed to disregard.

THE COURT: Sustain the objection. Disregard the statement, members of the jury.

MR. BAUGH: Move for a mistrial.

THE COURT: Denied.

MR. BAUGH: Note my exception.

Q What was the speed of the vehicle when it left?

A They left at higher than a normal rate of speed. I, they didn't speed or spin their tires when they were going away.

Q O. K. Answer any questions that Mr. Baugh might have.

CROSS EXAMINATION BY MR. BAUGH:

Q You saw the cross in the ground before it was lit, didn't you?

A Yes, sir. I did.

Q And based upon your years of life, you're not surprised to hear the Klan burns crosses, do [117] you?

A I was surprised to see it in Carroll County. Yes, I was.

Q Yes. But you know it's not uncommon for the Klan to burn a cross?

A I know they burn crosses. Yes, sir.

Q All right. You didn't know for sure it was illegal until after it was lit. Am I correct?

A I knew there was a statute. I didn't know what the statute said.

Q All right. And, but you didn't even ask, well, how long were you there in the presence of the unlit cross?

A Twenty (20) to thirty (30) minutes.

Q And how long were you there before you called dispatch and asked them to look up the statute?

A Ten (10) to fifteen (15).

Q So you're not saying that if you had gone over and told these people it was illegal to burn the cross, they were going to burn it anyway?

MR. GOAD: Objection. Speculation.

[118] MR. BAUGH: Withdrawn.

Q Sir, you don't, you don't speak for all black people, do you?

A No, sir.

Q They don't have a meeting and elect you representative, do they?

A That's correct.

Q Or Hispanics, for that matter?

A That's correct.

Q So when you say a black family came up and drove away, you don't know if they drove away because they felt threatened or they were laughing at a percale posse that was standing around a burning stick, do you?

A I just had my personal opinion.

Q You had your opinion. However, you know when you're on the stand because you're a trained officer – we've both been doing this for years – we talk about evidence, don't we?

A That's correct.

Q All right. You don't have any evidence of that, [119] do you?

A No, sir.

Q Thank you. Now, how many officers were out there while the cross was burning?

A Myself, Sheriff Manning and Deputy Sheriff Larry Hall.

Q And you say there were how many people on the, members of this, members of the group around the cross?

A Twenty-five (25) to thirty (30).

Q All right. Did you get out of your vehicle?

A Yes, sir.

Q Did you walk around?

A At which point, sir?

Q I mean, did you, I mean, during the twenty (20) minutes you were t here [sic], did you walk around your car? Did you walk to one (1) side of the street, back, forth, observe what was going on?

A On more than one (1) occasion, yes, sir.

Q All right. Did you pull your shotgun out of the car?

A No, sir.

[120] Q Did you understand that burning a cross was part of their ceremony?

A No, sir. I didn't know much about the Klan.

Q All right. Oh, were the people at this rally making statements?

A I could hear people talking, but from the distance that I was at, it was unintelligible.

Q Am I correct then that, were they using any type of amplification device?

A There was a generator running and you could tell somebody was talking over a PA, but I couldn't understand the words.

Q So you don't know if anyone was advocating violence, anyone was advocating bodily injury, if they were praying, you have no idea what was being said, do you?

A I couldn't understand a word, sir.

Q All right. And you were out of your vehicle?

A On more than one (1) occasion.

Q That's right. And you were certainly no more closer than the people who were driving by?

A No, sir.

[121] Q According to the response we have here on the Bill of Particulars, the government advocates that, do you personally agree with the philosophy of the Ku Klux Klan as you understand it?

A Absolutely not.

Q And did you feel threatened by their actions?

A I felt moral, moral outrage.

Q That's a nice answer, but perhaps you could answer my question. Did you feel threatened?

A For my personal safety, no, sir.

Q Thank you. Pass the witness. No further questions.

AND FURTHER THIS WITNESS SAID NOT.

THE COURT: Any further questions?

MR. GOAD: If I could have just a moment. No other questions at this time. We'd like to reserve the right to recall.

THE COURT: All right. We'll ask you to remain in the witness room until you're recalled and don't [122] discuss your testimony with anyone.

SGT. CLARK: Not with the other witnesses?

THE COURT: Well, the two (2) that's testified can stay together, but not with the ones that have not testified.

[The witness, First Sergeant Richard C. Clark, Jr., is again excluded from the courtroom and from the hearing of any of the matters therein.]

THE COURT: Next?

MR. GOAD: Rebecca Sechrist.

* * *

REBECCA SECHRIST, first having duly affirmed her oath to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION BY MR. GOAD:

Q Good afternoon.

[123] A Hi.

Q State your name please.

A Rebecca Sechrist.

Q O. K. And, Mrs. Sechrist, if you would, scoot up a little bit so we can pick up the voice on the mike so everybody can hear. Where do you live at, Mrs. Sechrist?

A In Cana. Cana, Virginia.

Q That's in Carroll County?

A Yes, sir.

Q And your husband's name is Roger?

A Yes, sir.

Q And did you live in that area on August 22nd, 1998?

A Yes, sir.

Q And were you at home that day?

A Yes, sir. We wasn't, we wasn't home that day, but we was home that evening.

Q Right. What time did you get back home?

A About four o'clock (4:00), between four (4:00) and four thirty (4:30).

Q And what did you find once you got back home?

[124] A Well, right beside our house, it was all roped up, off, and we at first thought it was a, somebody going to build something or something and then when we asked my mother-in-law and she said that they were having a Ku Klux Klan meeting.

Q Right.

A Yes, sir.

Q Did you see any sign indicating that?

A Not until late that evening, later, you know, right before it.

Q Uh-huh. Now, this was not on your property?

A No, sir.

Q Property that adjoins you?

A Yes, sir.

Q And did you see any individuals out in the field?

A Yes, sir.

Q And what were they doing?

A Putting a cross together.

Q Right.

A And they were just hanging out, you know, but [125] most of the men were putting a cross, a big cross together.

Q Right.

A And they had little kids and everything out there helping.

Q Right.

MR. GOAD: If I may approach the witness?

THE COURT: You may.

Q I have in my possession Exhibits #1 through #4. I have at this time Exhibit #2 and there's a house in the corner of the picture.

A That's our home.

Q O. K. Now, I understand that you all were actually not living in it at that time?

A No. They just had brought it that week and set it down.

Q And your husband's parents live next door?

A Yeah. On up the hill, up this way.

Q Right. So you were actually staying with them and getting ready to move in?

[126] A Yes, sir.

Q O. K. And who owns the property next to you?

A Joey Sechrist or Anna Lee Sechrist.

Q And that's his mother?

A Yes.

Q O. K. And were you present in the area from four o'clock (4:00) that afternoon on into the evening?

A Yes, sir.

Q And what did you do during that time?

A Mostly sat and watched to see what's going on.

Q Right.

MR. GOAD: If I may approach again?

THE COURT: You may.

Q On Exhibit #2, there's been a notation by the Sheriff of the general area of where the cross was erected at. Does that appear accurate?

A Yes, sir.

Q O. K. And you would agree that it's a pretty flat terrain area from the road area?

[127] A Yes, sir.

MR. BAUGH: Your Honor, the photograph will speak for itself.

MR. GOAD: Yes.

THE COURT: Sustain the objection.

Q Now, in this part of the picture, it appears to drop down on the back side. Do you know the lay of that land back in that area?

A Now, right in here, it kind of goes down, but it goes back up on, behind these trees and it's kind of flat, you know, pretty flat out back behind the trees.

Q Right. Is that an open field in that dip on the back side?

A Right here?

Q Right.

A Not right here, it's not, but on the back side of these trees, it is. You can see it like from right behind our trailer and look around these woods, you can see how open it is back there.

[128] Q Right. And that's still the property of Joey Sechrist's mother?

A Yes, sir.

Q Now, if a person was back there, could they be seen from the public road?

A No. No, sir.

Q O. K. Did there come a point where various speeches began being made from the group?

A Yes, sir.

Q And was there a PA system or just people speaking or what?

A They had a PA system. You know, before, before they put the robes and stuff on, they just, you know, talked, but after they put the robes on, they had a PA system and a stage.

Q Uh-huh. So when the speeches were being made, the robes were on?

A Yes, sir.

MR. BAUGH: Objection to speeches, Your Honor. I don't believe she's testified to that. That's assuming a fact not in evidence.

[129] THE COURT: Sustain the objection.

Q Did there come a point where you heard statements being made from the group?

A Yes, sir. All of them that had . . .

Q Excuse me. Let me jump in for a second. And at that time, were the robes and the hats on?

A Yes, sir.

Q All right. And do you know how many people spoke?

A All that had the robes on got up and said a, a little speech about what they were there and what they believed in and stuff.

Q Right. Did you hear any threats being made from those statements?

MR. BAUGH: Objection unless they came, they were coming from my client, Your Honor. I don't want my client being held responsible for statements made by others.

MR. McLEES: Your Honor, . . .

MR. BAUGH: I'm going to object to being double-[130] teamed finally. Whoever is going to handle the questions is going to handle the objection.

MR. McLEES: I think that's entirely up to the Court. I think that's within the discretion of . . .

THE COURT: I think it's appropriate that, Mr. Goad is asking the questions, so let him state the objection.

MR. BAUGH: Thank you.

MR. GOAD: Judge, to begin with, he's waived that objection during his cross examination of Investigator Clark. He asked him were there any statements made by the individuals that he could hear. He also asked were there any threats that were made from the rally. He's opened the door on this issue and he can't object to the testimony regarding that very same issue at this time.

And, secondly, it's an adopted admission by the Defendant. It's already in evidence that he's admitted that he was the leader of the Klan rally, that he was responsible for the burning of the cross, thereby he's made an adoptive admission of what the speeches were made during this rally.

[131] MR. BAUGH: Do I understand it correctly if I'm a member of the Democratic party and someone says something, then that means I'm saying it as well? Your Honor, that is not only not a proper evidentiary argument, that's illogical. Additionally, Your Honor, I would point out that I asked the officer not what were the contents, I said were they made. He said no. If I had gone into what statements were made, counsel should have objected because that would have been impermissible. But this, he's now trying to find out what was said and that is a violation, unless they have a recognized common law hearsay exception that overcomes the presumptions of the confrontation clause, that is impermissible.

THE COURT: Any further comment?

MR. GOAD: Just the test for the adoption, the adoptive admission is whether a person similarly situated would have felt themselves called upon to deny the statements effecting them in the event they did not intend to express acquiescence by the failure to do so. With these statements being made at his rally, I think these are relevant as adoptive admissions.

MR. BAUGH: If this lady's, first, I'm not [132] saying that's valid, but even then, I haven't even heard them say he was present at the time these statements were made. May I take her on *voir dire* to make determination and then the Court can rule?

THE COURT: You may.

VOIR DIRE EXAMINATION BY MR. BAUGH:

Q Ma'am, did you see this lady, this man here when the speeches, you say, were going on?

A Yes, sir.

Q Do you recognize him? You saw him the whole time?

A He was there and then after, now, after they put the robes on, I couldn't tell you who was who.

Q And so you said that while the speeches, they put their robes on and started giving speeches. Right?

A Yes, sir.

Q So you don't know if when the speeches were going on, he was there or not. Right?

A No. I couldn't recognize him after the robe was [133] on.

Q Thank you.

MR. BAUGH: Re-urge the objection twice.

THE COURT: Do you have any questions you would like to ask with the, with, in that regard?

MR. GOAD: No, sir.

THE COURT: Anything further you want to say about it?

MR. GOAD: No, sir.

THE COURT: I'm going to overrule the objection. You may proceed.

MR. BAUGH: Note my exception.

THE COURT: Yes, sir.

CONTINUED DIRECT EXAMINATION BY MR. GOAD:

Q O. K. Mrs. Sechrist, if you would, go forward and tell us what threatening statements you heard being made at the . . .

MR. BAUGH: Objection to the characterization of [134] threatening. She can say what she heard.

THE COURT: Sustain the objection. Don't lead the witness. You can ask her what she heard and she can tell us.

MR. GOAD: Yes, sir.

Q What statements did you hear?

A They were real, they were real, talked a lot about blacks – and I don't call them the word they called it, they called it, it started with an *N* and I don't, I don't use that word, I'm sorry – but they talked real bad about the blacks and the Mexicans and they talked about how one (1) guy got up and said that he would love to take a .30/.30 and just random shoot the blacks and talked about how they would like to send the blacks and the Mexicans back from where they come from and talked about President Clinton and Hillary Clinton and about the government funding money for the, for the people that can't afford housing and stuff and if they, their tax, how their tax paying goes to keep [135] the black people up and stuff like that.

Q Right. And how did this make you feel?

A It made me feel very, I was scared. I was, I was, there was people down at the road hollering and then them up there talking about stuff like that and, you know, all these people were hollering that thought we had it in our back yard because, see, they just brought our home that week and set it down and they were hollering, they don't see how these people can move in . . .

MR. BAUGH: Object, Your Honor. We're now going to statements from people who were not in the rally.

THE COURT: It sounds that way.

MR. GOAD: That would be a proper objection.

THE COURT: All right. Sustain the objection.

Q How did the burning of the cross make you feel?

A Oh, it made me feel awful. It, they all walked around and then they would go in one (1) circle and say things and then they would go around in [136] another circle and say things and then they went up and all met at the bottom of the cross and lit it and played *Amazing Grace* and I tell you what, I was just, it was just terrible. It was terrible to see, that, when they were talking about random shooting black people and all, the guy that said it and everything talked about killing people and then get up there and said that when he died, he knowed, that he was a good Christian and when he died, he knowed he was going to heaven and then to burn the cross like that, I just, I just, I couldn't begin to put in words how I felt. I cried, I sat there and I cried. I didn't know what was going to happen between everything going on. It was just terrible.

Q You know, when you said earlier that you were scared, what were you scared of?

A I was scared our home would get burned or something would happen to it. We've got two (2) kids and I was afraid that something would happen to them because they're, they've got [137] their license, they're out by theirself and, I mean, you know, for weeks after this happened, we had trouble with people riding by, stopping in the middle of the road, hollering white power and just, you know, we had an awful time and we didn't know what to expect.

Q Right.

A And we was just afraid one (1) day we'd get up and our house burned or get shot at or something, we didn't know what to expect.

Q How long did that feeling go on?

A It went on for at least, for a couple of months and then after the cold, cold weather, you know, they got to where that, it never failed that, every time we, like I said, they just put our home in and we stayed outside working on it a lot and when they would see us out, it seemed like it would just start, every little bit, riding by hollering.

MR. BAUGH: Objection again, Your Honor. These are statements by people other than those at the rally. [138] They should be excluded. We'd ask the jury to be instructed to disregard.

THE COURT: Do you agree with that, Mr. Commonwealth?

MR. GOAD: Yes, sir. She hadn't said it yet and I agree that it is a proper objection.

THE COURT: Members of the jury, the statements attributed to other people after the rally, disregard all those statements and don't consider it in arriving at your verdict.

Q O. K. Answer any questions Mr. Baugh might have.

CROSS EXAMINATION BY MR. BAUGH:

Q Mrs. Sechrist, I'm David Baugh.

A Hi.

Q We've never met. Ma'am, when you said you were afraid somebody might come burn your trailer, you were afraid that the people who didn't like the Klan were going to come. Right?

[139] A No, sir.

Q Oh, you thought the Klan was going to come?

A Yes, sir. Anybody that can burn a cross like that, I, and have so much hatred for people, I don't, I don't put anything past them.

Q And this isn't a stupid question.

A Yes, sir.

Q It's for the purpose of the record.

A Yes, sir.

Q You're not black or Hispanic, are you?

A No, sir.

Q O. K. Now, you were there from four o'clock (4:00) until, what time did they leave?

A I don't, I have no, I don't know. We were outside and I didn't have a clock. I don't, it was late.

Q Ten (10:00), eleven o'clock (11:00) maybe?

A Yes, sir. Somewhere around there. And the . . .

Q Did you have a car out there?

A Did we have a car? No, sir.

Q How did you get there?

A Our, walking. My mother-in-law lived right [140] there near us.

Q You didn't have a telephone yet, did you?

A No, sir. They just had set it down that week.

Q Ma'am, did you ever get so fearful that you and your husband walked away?

A What do you mean – walked away?

Q Went up to your mother-in-law's house?

A Yes, sir. We . . .

Q Between four (4:00) and eleven (11:00), did you go?

A Yes, sir.

Q You left? When were you gone between four (4:00) and eleven (11:00)?

A Now, we sit on the bank right at our mother-in-law's house the whole night. We was afraid to go, we was afraid to leave after the law run them off.

Q But, ma'am, didn't your mother-in-law give them permission to do, to have this thing?

A No, sir.

Q She didn't sign a lease agreement?

A No, sir. You're talking about my husband's [141] aunt?

Q Oh, I'm sorry. Forgive me.

A Yeah.

Q All right.

A No. My mother-in-law had nothing to do with this.

Q Who is, who is your husband's aunt?

A Anna Lee Sechrist.

Q She's the owner of the property?

A Yes, sir.

Q And it's your understanding that Anna Lee Sechrist gave the Klan permission to have this function on her property?

A From what I heard.

Q Is she here?

A No, sir.

Q As you sit here now, do you know if the Klan did anything out there that she didn't know about?

A No, sir. But it was told . . .

Q O. K. Now, and you say while they burned the cross, they stopped doing the screaming and stuff about black people and they started [142] singing *Amazing Grace*?

A No, sir. They didn't . . .

Q When did they sing *Amazing Grace*?

A They didn't sing. They played it on the intercom system.

Q Oh.

A It was just music.

Q All right. They played *Amazing Grace*?

A Yes, sir.

Q And let me guess, while they were burning the cross, they weren't talking any more. They were listening to the music?

A Yes, sir.

Q All right. And there was nothing threatening about *Amazing Grace*, was there?

A While the cross was burning, I felt it was.

Q Do you think *Amazing Grace* is scary when . . .

A No, sir.

Q O. K.

A It's the most beautiful song.

Q Yes indeed. Did you see the police out on the street, on the road?

[143] A Well, it was dark and you couldn't tell, the dark, you couldn't see who was on the street.

Q Did you go complain to the police?

A Yes, sir.

Q All right. You saw their blue lights flashing?

A Yes, sir.

Q And when did you complain to the police?

A When they had pulled up around our trailer.

Q And who is they?

A Sheriff Manning and . . .

Q The question, ma'am, did you see the police out in the street an hour and a half before the cross got burned?

A No, sir.

Q I will ask you specifically if you saw a light, if you saw a car with a blue light on top of it on that road?

A No, sir.

Q Did you look out in the street to see what was out there?

A You couldn't tell what was out there. It was too dark.

[144] Q You're telling me that from your trailer to the road surface, if a police car was sitting out there with its distinctive blue lights going around, you can't see it?

A Well, at the road, the lights wasn't going around until they got pulled off to go up toward, up toward our trailer.

Q So if hypothetically someone were to come to court and say that they put their police equipment up there an hour and a half before the cross was burned and they watched and they had their safety equipment on, that's not a true statement?

A Well, now, when they, before, right before they come over, they turned them on.

Q No. The question was, if someone said that his safety equipment was on, the blue lights . . .

A Yes, sir.

Q The car was parked an hour and a half before the cross was burned . . .

A Yes, sir.

Q That would be a false, he, he, that would be a [145] false statement?

A Yes, sir.

Q That someone was sitting with those lights on?

A Yes, sir.

Q All right. Now, of course, . . .

A Not with the lights blinking, you know. They wasn't, the lights wasn't blinking on.

Q Well, could you see a car parked out on the road?

A Yeah. Yeah.

Q And could you see that the car had a light rack on top of it?

A No, sir.

Q Did anyone ever say anything threatening directed toward you?

A No, sir.

Q So it's your testimony that the hatred, we'll say for want of a better term, being exhibited made you uncomfortable?

A Yes, sir.

Q All right. And you're uncomfortable by other displays of hatred, aren't you?

[146] A Yes, sir.

Q I mean, if you seen this on television, it would have disturbed you, wouldn't it?

A Yes, sir.

Q And when you see things just men disliking other men, it makes you uncomfortable, doesn't it?

A Yes, sir.

Q Did, do you know whether or not the people who were there that night – the Klanspeople, assuming they're all Klanspeople – do you know of your own knowledge whether or not they asked Mrs. Annabell Sechrist, I'm sorry I'm messing up your last name . . .

A That's okay.

Q I know I'm not the only one (1) who's ever done it. Do you know if those Klanspeople, if they were doing anything that they hadn't asked Annabell Sechrist permission to do? Do you know that of your own knowledge?

A No, sir.

Q Based on what you saw, your subjective opinion, did you get the impression that these people [147] were intentionally trying to scare you or were they just saying things of hatred that made you scared?

A I think they were trying to scare me.

Q All right. And what did they say that made you think they were trying to scare you?

A Well, they were asking, they were asking Joey, Anna Lee's son, who we were and, and asked who our mother-in-law and father-in-law was and all about us and, I mean, if there wasn't anything to do with us, I can't see why they cared who we were.

Q So they, because they asked you that, you thought they were trying to threaten you?

A Yes, sir.

Q But they didn't, when they asked you this, they didn't make any threatening statements to you, did they?

A No, sir.

Q So, I mean, and you've been asked who you are before in your life?

A Yes, sir.

[148] Q So because you were being asked by Klansmen, you perceived that as threatening?

A Yes, sir.

Q It isn't what they said or the way they said it, it was the fact that Klansmen said it?

A Yes, sir.

Q Do you dislike anybody?

A No, sir.

Q You like everybody?

A Yes, sir.

Q Even Rush Limbaugh?

A Who?

Q Rush Limbaugh?

A I don't know who that is.

Q O. K. Pass the witness. I could tell you didn't know.

THE COURT: Any further questions?

MR. GOAD: Yes, sir. A few follow up.

RE-DIRECT EXAMINATION BY MR. GOAD:

[149] Q Anna Sechrist was the owner of the land where the meeting was on?

A Yes, sir.

Q And her son is Joey?

A Yes, sir.

Q All right. And where is your tract of land located?

A Right about, I'd say about thirty (30) foot from where theirs starts.

Q Right. And so it's adjacent to that?

A Yes, sir.

Q All right. Now, who lives on the other side of you?

A On the other side?

Q Right.

A My mother-in-law and father-in-law.

Q And is that the location that you were at?

A Yes, sir.

Q You didn't have anything to do with Anna Sechrist or Joey Sechrist?

A No, sir.

Q O. K. All right. Did you see any blue lights [150] being turned on that night?

A Yes, sir.

Q And was that before or after the deputies first came up to you?

A Before.

Q Right. And then was that when you made your report to them, when they came up?

A Yes, sir.

Q And then was that also before the cross got burned?

A No, sir. That was after the cross got burned.

Q When you made your report?

A Yes, sir.

Q What about the blue lights? Was that before the cross?

A No, sir. It was after the cross.

Q After the cross. O. K. All right. Thank you. That's all.

AND FURTHER THIS WITNESS SAID NOT.

MR. BAUGH: No further questions.

[151] THE COURT: All right. Do you plan to recall this witness?

MR. GOAD: Possibly.

THE COURT: All right. We'll ask you to wait then in the back area until you're recalled and don't discuss your testimony with anyone please.

[The witness, Rebecca Sechrist, is again excluded from the courtroom and from the hearing of any of the matters therein.]

THE COURT: Any further evidence?

MR. GOAD: No, sir. That would be our case.

THE COURT: Commonwealth rests. Members of the jury, we're going to take a recess at this time and don't discuss the evidence or anything at this point, wait until

you hear the arguments of counsel. You may now retire and make yourself comfortable and we'll take about fifteen (15) minutes.

THE JURY RETIRES TO THE JURY ROOM, OUT OF HEARING OF ANY MATTERS HELD IN THE COURT-ROOM

[152] THE COURT: All right. The jury has departed. Do I have any motions to come before the Court?

MR. BAUGH: Your Honor, we would have a motion to strike. We would reassert all our previous motions. I would tell the Court that now we see the problem with this statute and its lack of definition. The standard here is intent of a Defendant. As the Court is well aware, the intimidation cannot be based upon some sensibility of the person who feels threatened. It must be actually directed with the intent to cause them to be fearful.

All of this occurred on property where it appears there was permission. Nothing appeared to have occurred, there was no trespass. The lady said that, Mrs. Sechrist said the reason that she was upset was not because of what was said, but because of who was saying it and there's the problem. That's the problem with this statute. That sort of thing happens.

So for the reasons previously stated and the light that the government must prove, even with their inferences now, I understand there's an inference that the burning of a cross, however, that the burning of a cross is calculated to intimidated, but this lady has now given [153] us another alternative. This lady said that there were threats going on, but when it came time for the cross to be burned,

everybody got quiet and they played *Amazing Grace* and remember, the crime, going back to real basic law school, a crime occurs when all of the elements occur in the same time and space. Therefore, the threat to intimidate and the burning of the cross must occur in the same time and space and they didn't. When the cross was burning, they were playing *Amazing Grace*.

Your Honor, I would submit that the government has not met its burden of showing that the purpose of the burning of the cross was to make people in fear of bodily injury, even though not imminent, even though I've made that objection previously, that was not the purpose.

Now, Your Honor, there's a lot of discussion here about Klansmen and robes and all that – and I've got trouble with them, too – that doesn't change the standards of the law. It must be calculated to cause fear of bodily injury. Your Honor, we now have from the government's witness a different version and therefore they've lost their inference with that witness and I'd make a motion to strike.

[154] THE COURT: Gentlemen?

MR. GOAD: Judge, of course, on the motion to strike, the evidence is viewed in the light most favorable to the Commonwealth. At this stage in the case, we have presented sufficient evidence. You have the inference of the statute which is very important and then you have to look at the evidence of the case as a whole, you just can't say when this happened at one (1) time, this happened thereafter, it's all considered together.

In the case, you have the burning of the cross which is the presumption of the intent to intimidate, during leading up to the burning of the cross with the speeches, you have

specific direct language of, that we're going to take a .30/.30 and shoot the black people, which, of course, that wasn't what they said. The testimony was that they used the *N* word and that they were going to shoot them randomly. That further goes to the intent and then you have the Defendant's own words that, after he was arrested, to Investigator Clark, he said *when is the white man going to stand up to the* – should they be in here?

THE COURT: No. They shouldn't.

MR. BAUGH: No. I had a question for the [155] Sheriff. You need to step out.

MR. GOAD: And his own statements of *when is the white man going to stand up to the blacks and Mexicans in this area* and then you have the bit about the blacks and Mexicans holding hands with the white women along the sidewalks in this area.

So you have his own words. You have the presumption of the cross. You have the let's take a .30/.30 and shoot them during the rally and then also you have the size of the cross – twenty-five (25) to thirty (30) foot high. The testimony is that they could have went on to a back section of the property and where they would have not have been seen and had this rally, but, no, they had it near the public road in a flat area where the twenty-five (25) to thirty (30) foot cross – which I think is also relevant on the issue of intimidation, the height of it – so, in summary of all that together, there is sufficient evidence.

THE COURT: You may close.

MR. BAUGH: Your Honor, I couldn't let it pass – the fact that the height of the cross has something to do with the degree of intimidation. So if my client were to

[156] burn a smaller cross, it would be okay. Your Honor, the problem with this sort of statute is that it lends itself to people allowing their own prejudices to attack the prejudices of others and that's the problem with this statute. It leaves vagueness as a standard.

They have not met their burden on the statute. We move to strike.

THE COURT: All right, gentlemen. Thank you for those observations. Considering the evidence in its entirety, the Court is of the opinion that the evidence is sufficient to withstand a motion to strike. I'm going to deny your motion.

MR. BAUGH: Note my exception. We will call Sheriff Manning. I'm sorry. I just thought of it. Sheriff Manning please.

THE COURT: All right. We'll bring the jury back.

MR. BAUGH: Thank you.

THE COURT: See if they've had enough time. They may need another minute or two (2).

MR. BAUGH: Yes. We'll wait.

THE COURT: We promised them a little recess. [157] Let's take five (5) minutes of our own.

MR. BAUGH: Thank you, sir.

THE COURT STANDS IN RECESS

THE COURT: All right. Are we all back in the courtroom?

MR. BAUGH: Yes, sir.

THE COURT: Is the jury ready?

BAILIFF: Yes, sir.

THE COURT: All right. Bring the jury in.

THE JURY RETURNS TO THE COURTROOM

THE COURT: All right. You may be seated. Commonwealth's rested. Defendant have any evidence?

MR. BAUGH: Sheriff Manning please.

THE COURT: Yes. Sheriff Manning, you've been sworn. Just be seated and you remain under oath.

* * *

[158] SHERIFF H. WARREN MANNING, still being under his oath to tell the truth, the whole truth and nothing but the truth, was recalled to the stand and was examined and testified as follows:

DIRECT EXAMINATION BY MR. BAUGH:

Q Sheriff, a couple of questions. You saw my client there that night, didn't you?

A Yes, sir.

Q He was wearing the purple robe?

A I guess. I knew some kind of robe.

Q Was Mrs. Sechrist, Annabell Sechrist there?

A Yes, sir.

Q She's the property owner?

A Yes, sir.

Q She was sitting around while the cross was being burned, wasn't she?

A Yes, sir.

Q And it is her property?

A Yes, sir. Best of my, best of my knowledge.

Q And she was a participant, it would appear, in [159] the rally in which a cross was burned. Am I correct?

MR. GOAD: Objection. Speculation.

MR. BAUGH: Withdrawn. Rephrase.

THE COURT: All right.

Q Was she sitting within fifty (50), a hundred (100) feet of where this fire was burning?

A Probably.

Q Was she pointed towards what was going on?

A Yes. The best I could tell.

Q And she has trouble with her mobility, doesn't she?

A The only thing I know is she was sitting down. That's the first time I ever met her.

Q Did you ever go over and talk to her about this event because it was her property?

A No. I think she, if I'm not mistaken, she hollered at me and I think she got up, I'm not for sure, but she did say words to me.

Q And she said it was public property, private [160] property.

A Said they had permission.

Q She said the Klan had permission to do this?

A Right. She did.

Q And at that time you didn't know who the wizard was – when she made that statement? Am I correct?

A He had done came up and told me and then she started. I think that's the way it was.

Q As the owner of the property who was condoning the burning of this cross, in your estimation had she violated the law?

MR. GOAD: Objection. That's not relevant.

MR. BAUGH: It is, Your Honor. If, I mean, my, my client's intent in burning the cross is an issue, if he has permission and he doesn't think he's doing anything wrong and the owner's right there, that would certainly mitigate. We're not talking about sneaking into somebody's back yard and burning a cross.

THE COURT: Any further comment?

MR. GOAD: Judge, the fact that she may have [161] consented to the rally doesn't have anything to do with what the Defendant's intent was – which is what the issue is in this case. She hasn't been charged. We're only here with what the Defendant did. What she may or may not have done is not relevant.

MR. BAUGH: Your Honor, the statute says if you burn it yourself or you cause it to be burned and under

our statute if you aid and abet in the burning. She aided and abetted in the burning. She is an older woman. She wasn't arrested. I believe that is germane to the issue of mitigation. He gets arrested. The other person doesn't. And further, I would submit that his coming forward, I think the jury will reasonably infer the reason he came forward and offered to be arrested was because she was in trouble.

MR. GOAD: Objection. There's no evidence of that and mitigation is not for this stage either.

THE COURT: I sustain the objection.

MR. BAUGH: Note my exception.

THE COURT: Yes, sir.

Q When you got my client downtown to be booked, [162] was he still in his robes?

A No.

Q I want you to think back carefully. You do recollect him being dressed in a darker color than everybody else?

A The only thing I know is he had a robe. I'm not for sure of the colors.

Q But you're not saying he was in a white robe?

A Just, I felt like he was in some kind of robe, but the very distinct color that night, I just knew he was in a robe.

Q You're saying he was wearing a distinct color, what was the indistinct color that everybody else was wearing?

A Well, he was, all of them was, the way I seen it was white.

Q All right. And he was wearing a distinctive color?

A I think so. Yes, sir.

Q When you approached, was he sitting over in his vehicle?

A I really didn't see him when I came in because I [163] had to start talking to everybody trying to figure out who is responsible for the . . .

Q And he volunteered?

A He came up and said I am the head person.

Q Whatever.

A Yes.

Q Sir, as you're sitting here now, can you testify that the Defendant, Mr. Black, was standing around that fire when it was burned or that he lit it or that he made a speech?

A Only what he told me.

Q That's it?

A That's all I know, is what he said.

Q Pass the witness.

AND FURTHER THIS WITNESS SAID NOT.

MR. GOAD: No questions.

THE COURT: All right. You may step down.

[The witness, Sheriff H. Warren Manning, is excused from the stand.]

[164] MR. BAUGH: The defense would rest.

THE COURT: All right. Any rebuttal?

MR. GOAD: No, sir.

THE COURT: All right. Members of the jury, all the evidence is in and we will now take a recess that will be extended. Make yourself comfortable in the jury room and don't try to discuss the evidence at this time or your decision. That will come later after you've heard the closing arguments of the attorneys. You may now retire.

THE JURY RETIRES TO THE JURY ROOM, OUT OF HEARING OF ANY MATTERS HELD IN THE COURT-ROOM

THE COURT: Any additional motions?

MR. BAUGH: We would re-urge our motions previously, Your Honor, particularly, including our motion for mistrial made during the presentation of evidence and also during the chambers conference on the issues raised by the Commonwealth.

THE COURT: All right. The Court will adhere to its prior rulings and we'll go forward with the instructions. We'll take those up in chambers. Your [165] client is, of course, always welcome to come.

Let me state on the record. Mr. Black, we are now retiring to chambers to take up the instructions that will contain the law of the case and which the Court will read

to the jury. Of course, you are entitled and should be present at every stage of these proceedings. However if you waive the right, then you can no longer raise that as an issue on any subsequent appeal.

MR. BAUGH: I've explained to my client his right to be present. He's waiving it for this one (1). He may reassert his right to be present at any time and he waives it at this time, for purposes of this one (1).

THE COURT: O. K. I'll continue to invite him on each occasion then.

MR. BAUGH: Thank you, Your Honor.

THE COURT: Now, I'm going to either release the witnesses and tell them they're free to go or they can come into the courtroom.

MR. BAUGH: Yes, sir.

THE COURT: All right.

* * *

[166] IN THE COURT'S CHAMBERS – OUT OF THE PRESENCE OF THE JURY

[Present are the Court, the Clerk, the Court Reporter, Mr. Goad, Ms. Collins, Mr. McLees, Mr. Hurd, Mr. Baugh, and Ms. Davis.]

[While off the record, the Court accepted Instructions #1, #2, #3, #4, #5, #6, #7, and #8 which were presented by the Commonwealth without objection of the Defendant.]

MR. BAUGH: We would object to the instruction – *"The burning of the cross by itself is sufficient evidence which you may infer, from which you may infer the required intent"*.

Your Honor, we would say based upon the objections previously raised concerning our requirement, of course, of evidence and the fact that this certainly clearly states you may infer a criminal violation based solely upon the expression – and that's what this says, the expression itself is an inference of illegality and that is unlawful.

THE COURT: Isn't this in accord with the [167] statute?

MR. BAUGH: It is clearly, I will concur it's in accordance with the statute and it would certainly be dispositive of whether or not a warrant's at issue or whether or not we get to this juncture of the trial, but as to a directive to a jury. No, just because it's in the instruction, in the statute, doesn't mean that that issue goes to the jury. It is also controlling on the Court and at equal issues such as my motion to strike. To tell the jury that they may infer a crime solely from the expression, we would say, this instruction is a violation of the First Amendment.

THE COURT: Anything you'd like to say for the record?

MR. GOAD: This is taken straight out of the Model Instructions.

THE COURT: That doesn't mean that they're right.

MR. BAUGH: You're the first judge that admitted that to me.

THE COURT: It really doesn't mean they're right.

[168] MR. GOAD: And then as the Court noted, it does mirror the statute.

THE COURT: I'm going to give the instruction. It does mirror the statute and it's permissive – may infer the required intent, no presumption and so I think that that treats it as no more than an inference and it's still optional with the, with the jury and I'm going to give it over the objection of the Defendant.

MR. BAUGH: Note my exception, Your Honor.

THE COURT: Uh-huh.

MR. GOAD: Judge, there's one (1) thing I just noted, I'd forgot to look at it, but if you'll go back to the instruction on the elements of the crime . . .

MR. BAUGH: #8.

THE COURT: All right.

MR. GOAD: O. K. The very first sentence, *"The Defendant is charged with the crime of placing a burning cross in a public place"*, you don't have the phrase *"with the intent to intimidate"* and I just now remembered that. Should I add that?

THE COURT: O. K. Have you still got this on your machine?

[169] MR. GOAD: Yes, sir.

MR. BAUGH: I think we better put it in.

THE COURT: Yes. Would you . . .

MR. BAUGH: But that follows the, you did copy it out of the book exactly?

MR. GOAD: Uh-huh.

MR. BAUGH: Right?

MR. GOAD: But I left out the part about the, the *"on private property"* and just left it *"in the public place"*.

THE COURT: Carla, would you get that typed for us with that amendment?

MS. COLLINS: I'm sorry.

THE COURT: Or do you want to call?

MS. COLLINS: Sure.

MR. BAUGH: On the element instruction, after the first sentence, we need *"with the intent to intimidate"*.

MS. COLLINS: Sure.

THE COURT: O. K. We can substitute that when it comes back. Have you got any further?

MR. GOAD: Yes, sir. That's the definition of a [170] public place.

THE COURT: Any objection to that?

MR. BAUGH: No objection.

THE COURT: All right. That's #10.

MR. GOAD: Now, we go to the intent to intimidate, which I think is going to be our only real discussion.

MR. BAUGH: Kicking point. We have several. First, Your Honor, if I might, we will state that obviously intent to intimidate is an element of the offense and, as

such, I believe under the due process clause, it has to be defined for the jury.

We would propose two (2) – both based on *U.S. vs. Baker*. The first one (1) is *"The intent to intimidate means the conduct of the Defendant was calculated and intended to communicate an unequivocal, unconditional and specific threat to immediately inflict injury to the personal property of another"*. I'm assuming that because of the use of the word *immediate*, it's going to be overruled, but I'll object to it anyway. I would offer it at this time.

MR. GOAD: Which?

[171] MR. BAUGH: The first one (1) is, that one (1).

MR. GOAD: *"The term intent to intimidate means the conduct of the Defendant was calculated and intended to communicate an unequivocal, unconditional"*? O. K.

MR. BAUGH: So we'd offer that as Defendant's #A.

THE COURT: Well, we don't have objection yet.

MR. GOAD: Yes, sir.

MR. BAUGH: Oh.

THE COURT: All right. Let's hear it.

MR. McLEES: We do object to that, Your Honor, because of the use of the word *immediately* and I think the *unequivocal* and *unconditional* and specific is, is gratuitous also, but particularly because of the word *immediately*.

THE COURT: All right. I'm going to sustain the objection, deny this instruction and I'm going to mark it #11 . . .

MR. BAUGH: #11? Or do you want to do it #A or #B?

THE COURT: #A or #B?

MR. BAUGH: Whatever, whatever is your usual [172] policy.

THE COURT: Let's make this #A-1.

MR. BAUGH: All right.

THE COURT: And it was offered by the Defendant and I'm going to refuse it.

MR. BAUGH: Note my exception.

THE COURT: All right.

MR. BAUGH: As #A-2, *"The term intent to intimidate as used in these instructions means an act done with the express purpose to incite or produce again imminent lawless action by another and which is likely to incite or produce such action"*. We would offer it. I'm assuming, Your Honor, the government has the argument and I have nothing further.

THE COURT: Same argument?

MR. McLEES: That equates it with fighting words. This is, this, we object to it because the intent to intimidate is not the intent to incite others to lawless action. It's the intent to scare people by making them think they're going to be hurt.

THE COURT: I think the objection's well taken. I'm going to refuse this one (1).

[173] MR. BAUGH: The last one (1) we would offer is, it comes from Black's and it states *"Intimidate as used in the term with the intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere tempermental timidity of the victim. However the fear of the victim need not be so great as to result in terror, panic or hysteria."* and I'm trying to find one (1) that doesn't have a notation on it.

MR. McLEES: We don't, we don't have any objection to that one (1).

MR. BAUGH: I'm trying to find one (1) that doesn't have a cite on the bottom of it or some white-out.

COURT REPORTER: I can take it and recopy it.

MR. BAUGH: Thank you.

MR. McLEES: That one's clean, I think.

MR. BAUGH: Oh, good. Is that verbatim of mine?

MR. GOAD: Just in case.

MR. BAUGH: So they conceded it.

MR. GOAD: So which one (1) is this?

MR. BAUGH: I think this one's going to be, this [174] one (1) should be given, this is #A-3 and I believe it should be given after, immediately after the element instruction because intent to intimidate is an element.

THE COURT: Well, let's see then. I've got no problem with them, but the, and I don't know whether the jury pays a lot of attention to the way I number them. Instead of calling it #A-1 or #A-2, suppose I call it, whatever the element, what's the elements?

COURT REPORTER: #8.

THE COURT: Why don't I call it #8-A?

MR. BAUGH: No objection, Your Honor.

THE COURT: All right. Anything further?

MR. BAUGH: We have some punishment instructions. Do you want to do those now?

THE COURT: We'll have time to do that when the jury's out.

MR. GOAD: If I could have a moment. Then we have a verdict form. I took off the word guilty from the last case. I don't have a, I think I gave you a copy of that with that other . . .

MR. BAUGH: Yes. You did. I've got it.

MR. GOAD: O. K.

[175] THE COURT: How much time do you want to argue? Twenty (20) minutes a side? That's plenty. There's not that much to talk about.

MR. GOAD: That's true.

THE COURT: Not that much evidence. How about you?

MR. BAUGH: Was that a suggestion?

THE COURT: Uh-huh.

MR. BAUGH: Twenty (20) minutes to a side? That's fine, Your Honor.

THE COURT: Do you want me to tell you when you've used half of it or do you keep your own time?

MR. GOAD: Yeah. If you would, tell me.

THE COURT: I'll hold up my fist like that, it's half gone. If I hold it up like that, you've got two (2) minutes and I'll let you know when you have two (2) minutes.

MR. BAUGH: Thank you, sir.

THE COURT: Wait a minute. Here comes #8 redone, I hope. All right. We're ready to go. Anybody need time to get their thoughts together.

MR. GOAD: I'd like fifteen (15) minutes.

[176] THE COURT: Fifteen (15) minutes to get your thoughts together?

MR. BAUGH: I'd join in the request for some time.

THE COURT: All right.

* * *

IN THE COURTROOM – IN OPEN COURT

THE COURT: All right, gentlemen. Do you have your thoughts together?

MR. GOAD: Yes, sir.

MR. BAUGH: I wouldn't say that, but we're ready to argue, Your Honor.

THE COURT: All right. Well, let's bring in the jury.

THE JURY RETURNS TO THE COURTROOM

THE COURT: All right. You may be seated. Members of the jury, we have the instructions ready for [177] you and after I've read these instructions to you, then the attorneys will present their closing arguments.

The first thing I want to tell you about is the verdict form. At this point in the proceeding is the guilt or innocence stage. There's two (2) possible verdicts – first, *"We, the jury, find the Defendant guilty of burning of the cross in a public place with the intent to intimidate as charged in the indictment"* – if that is the jury's verdict, then the foreman should sign that portion of the verdict form. Secondly, *"We, the jury, find the Defendant not guilty"* – if that is the jury's verdict, then the foreman should sign that portion of this verdict form.

Providing this verdict form for the jury is for your convenience and in no way is this Court trying to tell you what your verdict should be.

Instruction #1. The Court instructs the jury that your verdict must be unanimous.

Instruction #2. The Court instructs the jury that the finding of the indictment by the Grand Jury against the Defendant in this case is no evidence against him and must not be permitted to influence the jury in any [178] manner in arriving at a verdict.

Instruction #3. The Court instructs the jury that the Defendant is presumed to be innocent. You should not assume the Defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the Defendant throughout the trial and is enough to require you to find the Defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the Defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

Instruction #4. The Court instructs the jury that you must not consider as evidence any matter that was rejected or stricken by the Court. It is not evidence and should be disregarded.

[179] **Instruction #5.** The Court instructs the jury that you are the judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias and, if any have been shown, their prior inconsistent statements or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all of the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

Instruction #6. The Court instructs the jury [180] that the burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged. It is not sufficient that the jury believe the Defendant's guilt probable or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction. The evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go outside the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and the defense and unless you believe that the guilt of Barry Elton Black has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find him not guilty.

The burden resting upon the Commonwealth to prove the guilt of Barry Elton Black beyond a reasonable doubt does not require that such guilt be proven beyond every imaginable, conceivable or possible doubt, but only beyond a reasonable doubt. The jury must limit its consideration to the evidence introduced and you are not [181] to go

outside the evidence to hunt up doubts nor must you entertain doubts which are speculative or conjectural. And if, upon a consideration of all the evidence, you are satisfied of the guilt of Barry Elton Black beyond a reasonable doubt, then you shall find him guilty.

Instruction #7. The Court instructs the jury that it is not necessary that each element of the offense be proved by direct evidence. For an element may also be proved by circumstantial evidence. You may convict the Defendant on circumstantial evidence alone or on circumstantial evidence combined with other evidence if you believe from all the evidence that the Defendant is not innocent beyond a reasonable doubt.

When the Commonwealth relies upon circumstantial evidence, the circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt. The evidence as a whole must exclude every reasonable theory of innocence.

Instruction #8. The Court instructs the jury that the Defendant is charged with the crime of placing a [182] burning cross in a public place with the intent to intimidate. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the Defendant burned or caused to be burned a cross in a public place; and

(2) That he did so with the intent to intimidate any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above

elements of the offense as charged, then you shall find the Defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the Defendant not guilty.

Instruction #8-A. The Court instructs the jury that intimidate as used in the term with the intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such [183] fear must arise from the willful conduct of the accused rather than from some mere tempermental timidity of the victim. However the fear of the victim need not be so great as to result in terror, panic or hysteria.

Instruction #9. The Court instructs the jury that the burning of a cross by itself is sufficient evidence from which you may infer the required intent.

Instruction #10. A public place is any place open to the knowledge or view of all, generally seen or known, without privacy or concealment.

That concludes the reading of the instructions. I now invite your attention to the closing arguments of the attorneys.

* * *

CLOSING ARGUMENT BY MR. GOAD:

Thank you, Judge. Thank you, ladies and gentlemen of the jury. When we began this trial, I told you that I intended to present sufficient evidence that the Defendant, Barry Black, is guilty of the crime of [184] burning a cross

in a public place with the intent to, with the intent to intimidate and I submit to you that I have done just that.

Now, as I told you when we started the case, it was going to be short. We only had three (3) witnesses. You had Sheriff Manning who went to the rally, who confront Barry Black after the cross was burned and Mr. Black admitted that he was the leader of the rally and that he was responsible for the burning of the cross.

You had Investigator Clark who place him in his police car and then brought him to the jail for processing and during that trip, he asked Mr. Clark *when is the white man going to stand up to the blacks and Mexicans in this area* and then he also stated that he had been told that blacks and Mexicans were holding hands with the white women along the sidewalks here and Mr. Clark informed well, there's no sidewalks in Cana, Virginia to which he responded he apparently had been mislead.

And then you had the testimony of Mrs. Sechrist which is very important in this case. You have a person who was actually intimidated by the actions of Mr. Black. She was a neighbor adjacent to the property where this [185] rally was held. You heard her testify that during this rally she heard people shout let's kill the black people with a .30/.30 rifle. Of course, that wasn't the word they used. They used the *N* word. Repeated racial hatred, murder and mayhem.

Ladies and gentlemen, all of that occurred during the rally that Barry Black conducted that night. As the Court just read you the instructions, there are three (3) instructions that are very important to the case. They're #8, #8-A and #9 – and you'll have these to take back to the jury deliberation room, so I won't labor them through here, but

basically we just have to show that he burned or caused to be burn a cross in a public place.

The public place is not an issue because it was visible throughout the area of where it occurred and he admitted to leading the rally, so that's a given. #1 is proven. Then, #2, and this is the whole crux of this case, that he did so with the intent to intimidate any person or groups of persons.

And #8-A is the intimidation instruction. *"Intimidation as used in the term with the intent to intimidate means the motivation to intentionally put a* [186] *person or a group of persons in fear of bodily harm"* and then it continues on.

I ask you – and consider this – what more fear of bodily harm could there be when you have speeches to let's take another human being's life. You have statements and speeches at this rally to let's kill people. There could be no higher threat of bodily harm than that. So that has been shown, ladies and gentlemen.

And, further, you have Instruction #9, the *"the burning of a cross by itself is sufficient evidence from which you may infer the required intent"*.

Ladies and gentlemen, if you feel that he did not have the intent to intimidate any, to intimidate any person or groups of persons, then go ahead and find Mr. Black guilty [sic], but I submit to you that that was exactly what he intended to do that night. If he did not intend to intimidate anybody, why did he preside over this rally? If he did not intend to intimidate anybody, why did you have a twenty-five (25) to thirty (30) foot cross built on a flat area of land

when testimony showed that the owners of this land also owned an area that was behind the hill from this location and could not have been seen from the [187] public road. And why, if he did not intend to intimidate others, did you have statements encouraging murder going on at this Klan rally? And, finally, his intent is shown by his own words. His own words tell you his intent – *when is the white man going to stand up to the blacks and the Mexicans in this neighborhood*.

Ladies and gentlemen, our country has the constitutionally protected freedom of speech and everybody in this room is entitled to that and Mr. Black is, too, but what he is not entitled to is to intimidate others and that's exactly what he did that night and he's guilty as charged.

Thank you.

* * *

CLOSING ARGUMENT BY MR. BAUGH:

May it please the Court, counsel. I love this case. I love this case because it gives me an opportunity to test my principles. I recognize, based upon my knowledge, that the Ku Klux Klan is hate group and I view [188] it as a hate group and there are many groups that are hate groups and there are many groups that are perceived as hate groups, but we have a principle in our case, in our nation that no idea is so reprehensible that it cannot be discussed in the free marketplace of ideas.

The Commonwealth says that Mr. Black's alleged words about holding hands between the races is evidence of hatred and despicable. It wasn't until 1972 that it was legal in this state to have mixed marriages. That was the official position of the government. In fact, the judge on

the Supreme Court who ruled that mixed marriages were illegal is still the Supreme Court Justice in the Virginia Supreme Court.

We've made progress. He believes that, but that's his right and no one (1) has the right to tell him he can't believe that and he can't say it. Now, one (1) of the things that people hate about the Klan is the Klan seeks to muzzle who disagree with it and that's wrong. That's un-American. To muzzle people.

And the Commonwealth is advocating that we muzzle these people and muzzling people is wrong. The Commonwealth wants you to act just like the people they [189] despise. They want you to shut people up if they don't agree with you.

It's a funny thing about changing or chasing monsters. If you're very careful, you don't become one (1) yourself while you do it and while trying to defeat evil, you must be very careful you don't become evil. You must be very careful you don't make your opponents into your teachers and we use their tactics to muzzle them.

I appreciate the fact that all of you have taken this very seriously and you have. In fact, you may not realize it yet, but you're about to make the most important decision you have ever made in your lives. People go off to war and fight and die to defend the principles of our nation and today that's what you're going to do.

Now, you're serious about it and that is conceded. Your job, as jurors, is to run a check on the government – to make sure that the government in their efforts to protect us don't violate our rights or his rights. Now, Mr. Goad is telling you that this man is not like us. He's a Klansman.

He runs around in sheets. He says kill black people. He's not like us. We should [190] treat him differently because he's not like us. He's acting as though Mr. Black were an African-American and you were a Klan jury. He's not like us. We should punish him. He's different from us. We can skewer him. He's not like us.

And, by the way, we're not alike. We know that. The Klan hates African-Americans. I'm an African-American. Duh. I know what's going on here.

Did he burn a cross with intent to intimidate? It's not a question of is he hateful or does he belong to a hate group. That's not illegal. No. The issue is he did intend.

Now, I'm going to talk to you about some of the instructions, but all of them are important and just because I don't mention some, that doesn't mean they're not important and you should take them all back there and you should make sure you understand every one (1) of them, but some of them, I want to point out.

One (1), #9, *"the burning of a cross by itself is sufficient evidence from which you may infer the required intent"*, it doesn't say you have to. If the evidence as a whole does not convince you beyond a [191] reasonable doubt his purpose in doing that was to put people in fear of their safety, then he's not guilty.

Another instruction, *"it is not necessary that each element of the offense be proved by direct evidence. For an element may also be proved by circumstantial evidence."* You can look at evidence around something and determine what happened. And they can say well, you can look at the fact that he made statements about he doesn't like black people and he doesn't like Mexicans or that someone else

said we ought to shoot people using racial epithets. However, and they say that's evidence of his intent to scare people, not, not intent to just scare them, but to place them in fear of bodily injury.

"The evidence as a whole must exclude every reasonable theory of innocence." If there was a possibility, based on the evidence, that he intended to indicate he hated this, to indicate that he was vehemently and violently opposed to it or if there's a possibility that the burning of the cross was part of their ceremony, as the government said, or if it was religious, bizarre, but they stopped making their statements and they played *Amazing Grace*.

[192] Now, first, I'm not trying to tell you the Klan are a bunch of warm, fuzzy guys. I'm not. They have a hateful history in this nation. But you can't punish them for thinking it. Because if you can punish him for thinking something, you can punish me for thinking something. If you punish the Klan because they stand up and say we ought to shoot a certain group of people, every night when I talk about somebody ought to plug Rush Limbaugh, I can get arrested. I have the right to do that.

In America, we have the right to hate and we have the right to discuss it and we want people to discuss ideas like that and find out is it worthy of belief. If you believe he burned this cross or was part of this cross burning for any other purpose, if it's possible, the government must prove to him beyond a reasonable doubt that his purpose was to intimidate and if they don't prove that, you have a duty to acquit.

"The Defendant is presumed to be innocent." They say oh, well, what if, oh, how do you, how can you say he's not guilty, you know he doesn't like black people, you know he

doesn't like Mexicans, you know he [193] feels this way about this – and I'm only reading a portion – *"the Defendant is presumed to be innocent"*, down here it says, *"suspicion or probability of guilt is not enough for a conviction"*.

They must prove to you beyond a reasonable doubt that the Defendant burned this cross with the intent to people in fear of physical injury. Period. You can't speculate. That's what they have to prove. And if the evidence isn't there, you have to acquit.

Now, what is a reasonable doubt? The Court never defines what a reasonable doubt is, but I'll give you an idea – and this is my definition and it's not controlling on any of you, it is merely a suggestion. What goes on here today must be proven to you to the degree that five (5) years from now or ten (10) years from now and you hear that Judge Mink is on the Supreme Court of the United States and Mr. Goad is then Governor of the Commonwealth and you go I remember that case and I'm just as convinced today as I was then that his purpose was not to say he hated people, his purpose was not to say I disagree, his purpose was to put people in fear of being hurt and that's why he did.

[194] And the Commonwealth says oh, well, the reason he did that is he could have gone back in the bushes. He could have gotten around a little group of people and they could have had their little ritual back there. He has a right to make as many people as he wants to hear his opinion – all of us do. We don't have the right to limit him even if he is a member of a group.

"Intimidate as used with the term intent to intimidate", Instruction #8-A, *"means the motivation to intentionally put*

a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere tempermental timidity of the victim. However the fear of the victim need not be so great as to result in terror, panic or hysteria."

It's not how fearful someone was, it was what is his intent, what was his intent. Was this lady, Mrs. Sechrist, fearful? Yes. She was. Was she fearful of what they said to her? No. She was fearful of the fact they were Klansmen. And that's what she said. I wasn't fearful because they asked me who I was. I was fearful because Klansmen asked me who I was. That's not, that's [195] timidity. Period.

If these men and women and children had burned this cross on someone's yard to make that person move, yes, it would be a violation of the law. It would be a trespass. It would be an assault. It would be placing people in fear so they would move. They had permission to burn it.

People in this case say, well, let me ask you this. What if some religious group wants to have a rally and it makes members of the Jewish community or members of the Muslim community upset or fearful? I mean, when you read the history of the world, does the Inquisition ring a bell? All right? Can we stop them from having their rallies? Can we stop the church from having parades? No. Because they have a right to say what they want. This is America.

I know it bothers people when we give those freedoms and rights to ordinary people. Those of us in the government, we're better at determining who should have those rights and benefits. No. This is serious. Our nation is not a piece of dirt between California and Maine. It isn't. It's a

group of people who share a [196] common set of principles and ideals and they are contained in our Constitution. No matter where we are, as long as we believe in those ideals, we're Americans and one (1) of those ideals is that everyone has the right to free speech including him.

Now, he doesn't have the right to go out and deliberately make someone scared, to put them in fear, to assault them, to get up in their face and scream and make them feel like they're going to be hurt. He doesn't have the right to do that – and he didn't. And you have to protect it.

And I know, you're probably, no one's brought it up, but I know you're sitting there saying wait a minute, what the heck is the black lawyer doing defending the Klansman, why would he choose to do this. The Constitution and your role as citizens, it gives you certain responsibilities and duties and when you recognize what your duty is, you have no real choice. If your duty, and you have sworn an oath to God to follow the law, and if your duty says that he has not done what they say, that he did not intend, he did not mean for people to go get fearful, to be frightened, to be afraid they're going to [197] be attacked, then you have a duty to acquit him.

Now, if you believe, based on the evidence, not your conjecture, not because of what you know about the Klan, but what happened in here, if they have convinced you beyond a reasonable doubt that was his purpose, then even if you like the Klan, you have to convict him because that's your duty. You're not here to do what you want to do. You're here to do what your duty dictates.

But if they have not proven to you beyond a reasonable doubt that that was his purpose, you have a duty to acquit and it might be difficult. Some people are going to

say you were on that jury, how in the name of all that's holy could you let a Klansman go? Gee whillikers! I think you ought to shoot him. Klansmen, what, put a bullet in their head! And you're going to say because I have a duty, I have a duty to follow the law and I'm not like those other people.

It is going to be very serious. What is your role? Now, I want to tell you right now – I've told you, Mr. Goad has told you some of the facts as he recollects them. I've told you about what this lady said. We now know that he was wearing some kind of off-colored robe. [198] We don't know what the heck he did, but he did come forward and he said hey, I'll take responsibility for it, bordering on chivalry.

But the issue here, the issue we need to talk about in closing is what are his rights and what is your role. If while discussing the facts, I get something wrong, remember my recollection does not control. If his, his doesn't either, if he says it happened on Tuesday and I say it happened on Wednesday and you think it happened on Thursday, your recollection controls. Some, don't, we're not trying to trick you. Sometimes in the course of these sort of things, in advocacy, we get involved, we don't hear everything, but your role is to make sure that prejudice does not prevail.

You'll notice that everything I say that lady there is recording – everything that the Judge says gets recorded – when we go back in there, she goes with us.

You'll notice that when you go back in that room, nobody goes with you. Nobody checks. Everyone presumes that as citizens you will do that which the law requires. No one (1) goes, but you could go back there and arm wrestle, you could flip coins, you could, you could, you could base

[199] your verdict on anything you wanted to and no one (1) would know unless one (1) of you talked. You could go back there and say gosh, did you see Mr. Goad's tie, that's disgusting, we ought to acquit him. Somebody could say did you see that fat guy, we have to check. No one (1) would know.

But, you see, being a citizen means that we presume that ordinary people are capable of extraordinary acts and that includes doing what your duty requires on the jury and tolerating even the free speech of people you don't like or viewpoints you don't happen to share. The fear is not in what he says. We shouldn't fear that. The fear is in muzzling what someone thinks that we might disagree with. That's scary. That's Nazi. That's wrong. They want us to be like Klansmen. They want us to muzzle people we disagree with.

I'm not going to call upon racial issues. I'm not going to tell you that the Klan is a nice group of guys, even though some people think they are. I don't think so. I'm not going to tell you that the Klan doesn't scare me sometimes. I'm more scared of some other people than them, but they do. But I don't have a right to live [200] free of fear. If I'm scared, that's, I have to resolve it. Now, I have a right not to have somebody threaten me directly, try to get up in my face and tell me they're going to hurt me and make me think that if I don't punch him right now, something's going to happen, but I don't have the right to tell you to be quiet because I don't like what you say. That's wrong.

No. So, what I'm going to ask you to do, and, yes, one (1) other thing. Is Mrs. Sechrist scared? Yes. Is she lying to you? No. Was she fearful? Yes. Was she scared? Yes. Is that

relevant to the issue? No. The issue is not was she fearful, it is what is his intent.

The twelve (12) of you have something very hard to do because you're going to have to follow the law and doing what the law requires might not be what the majority of the people want, but you know what? I've been a trial lawyer twenty-five (25) years and I have never seen a jury cheat. Never. I have never seen a jury make things up. When people ask, you're going to go back there, the twelve (12) of you who have never, many of you have never met before, you're going to see something marvelous. For those of you who have never served on jury duty, you've [201] never met him before today, you've never met me before today, you've never thought about this issue – you're going back in that room and you're going to argue about this like it's the most important decision you've ever made in your life and that's the system working.

In the years I've been at it, I've heard people scream; I've seen, there was a case up in Roanoke not long ago where they deposed the foreman. They came out. You have a question from the jury, Mr. Foreman? I regret, Your Honor, I'm no longer the foreman. They fired me. They go back there and they argue about issues like that and that's the system working.

It's going to be hard. It's going to be hard because the Ku Klux Klan is not a likable group. Just like if he were a young man charged with rape, he wouldn't be a likable person or if he were a person charged with a drug offense, he would not be a likable person, but he's still entitled to certain rights and it's our job to protect them. This is not a choice. It's a duty. If they get up there and they try to tell you he's different from us and therefore he should be

treated differently, that's wrong. If you get the impression that they're [202] trying to appeal to your fear or to try to appeal to your desire to show your disagreement with his views – which I do vehemently, I disagree with Mr. Black and he knows it, we've discussed this – we ain't going to be buddies, we're not going to hold hands, we're not going to, you know, I'm not going to join the Klan and he's not going to join me, which is fine with me. I just feel that unless I protect him, I can't protect anybody else. If they muzzle him, they can muzzle other people. It's not that complicated.

My client is entitled to twelve (12) jurors to determine his guilt. If you go back there, twelve (12) of you, you should listen to your other jurors and you should hear what they have to say, you should ask them what do they recollect and if you agree with them, you should vote for them, with them. But if eleven (11) of them say he's guilty and you, based on your, because your oath is as an individual, if you're not convinced beyond a reasonable doubt, you can't change your vote to go along with the jury. Twelve (12) individuals, you should listen, but at the conclusion of your listening and arguing, you have not been convinced yourself, if you change your vote, you have violated your oath. Period.

[203] Some people might say well, I don't know if he's guilty or not, maybe we'll just find him guilty and we'll give him a one (1) penny fine. You've broken your oath. If it's not proven beyond a reasonable doubt, he's to be acquitted.

I started to say I feel sorry that you have to do this. I mean, you get stuck in there just because you're registered voters. You didn't do anything wrong, but you got up this

morning and say drat, I have to go to jury duty. You had no idea what you were going to get hit with. But actually I sort of envy you because you don't get a chance to prove your citizenship to yourself. We accept all the benefits this country gives us and you never get a chance to really test it. Today you get a chance to test it and I'll tell you that if you adhere to your verdict, whatever it may be, if you adhere to the principles, you will take pride in what you do here today, even if it goes against me, and all I'm asking you to do is adhere to your principles.

If they have not convinced you beyond a reasonable doubt that his purpose was to cause people to be fearful of being hurt, then you have sworn an oath to [204] God and you have a duty – whether you like him or dislike him or like his group or dislike his group – you have a duty to acquit him.

You've been very patient. Please give Mr. Goad your same attention. Thank you.

* * *

THE COURT: Mr. Commonwealth, you may close.

MR. GOAD: Thank you.

* * *

CLOSING ARGUMENT BY MR. GOAD:

You know, as this case has progressed, I've kind of like to view the case of one (1) of being receiving the facts from the Commonwealth and one (1) of the fluff from the defense. You heard arguments previously that we're out to get Mr. Black because he's a member of the Klan and that's not right, punish him. That's not accurate, ladies

and gentlemen. He's a member of the Klan and he has every right to be a member of the Klan and he has every [205] right to believe in what he wants to believe in and that's his constitutional right – the freedom of speech is here in Carroll County, Virginia; it's in Johnson County, Wyoming; it's in California; it's wherever; but what is different – and that's what we're getting here – is that nobody, nobody has the right to intimidate others. To stretch the freedom of speech to saying you've got the freedom to intimidate others is not right.

Now, think about that. You know, one (1) of your instructions said use your common sense. Well, let's do that. Do you think that when George Washington and Thomas Jefferson and all those guys was forming our Constitution, you know, we're talking about freedom of speech and all that, do you think, put yourself in that situation, do you think at any time during the making of our laws and the freedom of speech issue . . .

MR. BAUGH: Objection, Your Honor. You ruled we were not allowed to argue on the validity of the statute or the First Amendment and that's what I'm hearing and you said I couldn't do it.

[206] THE COURT: I agree.

MR. GOAD: He argued freedom of speech and I'm just bringing up the same issue.

THE COURT: I think you're going a step beyond that. I sustain the objection.

MR. BAUGH: Thank you.

MR. GOAD: Yes, sir.

MR. GOAD: Folks, this is not a freedom of speech case. This is one (1) about intimidation. As I've previously said, nobody has the right to intimidate others and as I mentioned a moment ago, let's use our common senses – and these are the main questions I want you to consider.

If he did not intent to intimidate somebody, why is he leading a Klan rally with a twenty-five (25) to thirty (30) foot tall cross in a public place? Now, these are the facts that we have to present them – yes, he's a member of the Klan, but, no, we're not saying that just because he's a member of the Klan, punish him. We want him punished and found guilty because of the threat of intimidation. Those other facts are part of the case, but [207] it's the intimidation that's what makes this different.

If he did not intent [sic] to intimidate anybody, why are we hearing comments at the rally of well, let's use a .30/.30 rifle and kill the black people while they use the *N* word. As I mentioned before, the threat of bodily harm can never ever be more serious than the threat of murder.

And finally what was his intent is shown to us by his own words. You know, as Mr. Baugh said to you earlier, what he says and what I say is not the evidence – what the evidence is, is what came from the witness stand and from the witness stand, you heard the statements of Barry Black when he said *when is the white man going to stand up to the blacks and Mexicans in this neighborhood, the blacks and Mexicans are holding the hands of the white women on the sidewalks in Cana, Virginia* when there is none. That's what he said. That is evidence.

Ladies and gentlemen, this was a ceremony and this was a ceremony of intimidation and he's guilty as charged. Thank you.

* * *

[208] THE COURT: All right, gentlemen. Thank you for those observations. Members of the jury, the first thing you should do when you retire is to select your foreman and then after you've deliberated, then use the verdict form that I have furnished to, to indicate what your verdict is and the foreman should sign the verdict form in the appropriate blank. You may now retire and if you would knock on the door when you finish deliberating, we'll let you return your verdict in open court.

All right. You may retire and we'll send the instructions and the verdict form in to you along with the exhibits. Any objection to the exhibits going in?

MR. BAUGH: No objection to the exhibits, Your Honor.

THE COURT: All right. We will send the exhibits in with the, with the jury.

THE JURY RETIRES TO THE JURY ROOM TO BEGIN THEIR DELIBERATIONS ON THE GUILT PHASE AT 3:58 PM

THE COURT: The jury has now retired. We'll recess as far as open court is concerned. We'll retire to [209] chambers and talk about additional instructions in case we need them. All right?

MR. GOAD: Yes, sir.

THE COURT: And you're, here again, for the record, Mr. Black, you're welcome to come back to chambers to discuss the potential instructions that may be needed if the verdict is guilty.

* * *

IN THE COURT'S CHAMBERS – OUT OF THE PRESENCE OF THE JURY

[Present are the Court, the Clerk, the Court Reporter, Mr. Goad, Ms. Collins, Mr. McLees, Mr. Hurd, Mr. Baugh, and Ms. Davis.]

THE COURT: With regard to the other instructions, I don't believe I put this on the record, the only objection really to any of the instructions was to #8-A, no, #8-A was not, that was just your third choice because I refused #A and #B . . .

COURT REPORTER: #A-1 and #A-2, you refused.

[210] THE COURT: #A-1?

COURT REPORTER: And #A-2.

THE COURT: Is that the way I did them?

COURT REPORTER: Yes.

THE COURT: All right. I had refused those. Were there any other objections to the first ones?

MR. BAUGH: I objected to the inference, to the inference instruction and you said it tracked the statute and that was permissible.

THE COURT: Right. That's the only one (1).

MR. BAUGH: And I took exception to your ruling.

THE COURT: I just wanted to have that on the record because for a minute, we didn't have the record on.

MR. BAUGH: Yes.

THE COURT: All right. What do we have with regard to the penalty stage if we have to go there?

MR. GOAD: The *"You've found the Defendant guilty and don't concern yourself with anything thereafter"*.

MR. BAUGH: No objection.

THE COURT: O. K.

COURT REPORTER: #11?

[211] THE COURT: Yes.

MR. GOAD: That will be which one (1)?

THE COURT: #11.

MR. GOAD: And the punishment ranges.

MR. BAUGH: No objection.

THE COURT: All right. #12.

MR. GOAD: And the punishment verdict form.

THE COURT: All right.

MR. BAUGH: No objection.

THE COURT: All right. I'll explain that first as usual. All right. Now, do you have any instructions?

MR. BAUGH: No, sir.

THE COURT: All right. Let's talk about the convictions that go, that we discussed in pre-trial this morning.

MR. GOAD: Yes.

THE COURT: And have you resolved what you were . . .

MR. GOAD: We really hadn't had a chance to address it, the prior convictions.

MR. BAUGH: Oh, we have not. I would make a suggestion that we, we can give them a list, you can draw [212] up a list of the, in this year, he was convicted of this; this year, he was convicted of this; this year, he's convicted of this. We can either recite it to them or you can recite it to them and I'll make no objection and that will be that.

MR. GOAD: What about letting them have the notices?

MR. BAUGH: Hmm.

MR. GOAD: I filed one (1) on one (1) date and then I realized that I hadn't put enough, are we on the record or off?

COURT REPORTER: You're on.

MR. GOAD: O. K.

THE COURT: Do you need to be on now?

MR. BAUGH: I think we need to be on.

MR. GOAD: All right. And then I realized there was one (1) conviction for like, it's phrased adultery and bastardy.

MR. BAUGH: That's a good one (1).

MR. GOAD: All right. And I had to get more information on that – like I had part of it and I needed to get some of it and so the next day, I got the rest of [213] it and filed an amended notice and added that additional information and on one (1) of the convictions, on the first one (1), I said he plead guilty. He actually plead nolo and so I correct that and I think those are the only amendments.

MR. BAUGH: I don't have a nolo on here.

MR. GOAD: It should be on the amended.

MR. BAUGH: Oh, I'm sorry.

MR. GOAD: And both of them were filed, you know, within the fourteen (14) day requirement. Or we could just do a list of those convictions.

MR. BAUGH: I would submit we just do a list and you can publish it and I'll say that's it.

THE COURT: Why don't you go get your secretary to do it?

MR. GOAD: Sounds good.

MR. BAUGH: So you're going to read it. Right?

MR. GOAD: We'll then introduce it as an exhibit.

MR. BAUGH: Do you want to introduce it as an exhibit?

MR. GOAD: Yes.

[214] MR. BAUGH: All right. You want to make a list and introduce it, no objection.

THE COURT: All right.

MR. BAUGH: I mean, I think the Court actually can take, under full faith and credit, you can take judicial notice that he was convicted of this, this, this and this and we don't even have to have any paper if you don't want to, but if you want it, that's fine.

MR. GOAD: Yeah. I'd like for them to have an exhibit to take back with them that shows them listed out.

MR. BAUGH: Oh. Your Honor, I don't think that list should go back.

MR. GOAD: Well, the convictions do.

MR. BAUGH: The convictions? Now, I've never had a conviction go back. We tell the jury what his record is and that's it. Their recollection controls. If there's authority that says it has to be in writing and it has to be tendered as an exhibit, I'm not mindful of that authority.

THE COURT: Do you have any authority? We've just never had the issue before.

MR. GOAD: I'd have to look at the statute, but [215] we've always introduced the certified copies because we had to prove the conviction.

THE COURT: What's your Code Section?

MR. GOAD: It's § 19.2-295.1.

MR. BAUGH: Right. I want you to know we have reasonable explanations for all of these convictions.

MR. GOAD: Even the adultery and bastardy?

MR. McLEES: Yeah. We want to hear about that one (1).

MR. GOAD: It was referred to at one (1) point as fornication and bastardy.

THE COURT: I don't know that the Code section helps a whole lot. It just says *"At such proceeding, the Commonwealth shall present the evidence of the Defendant's prior criminal convictions by certified, attested or exemplified copies of the record of conviction"*. Then we'll go down to the, later in the statute, then it just says *"After the Commonwealth has introduced such evidence of prior convictions or if no such evidence is introduced, the Defendant may introduce relevant admissible evidence related to punishment"*.

So it really doesn't say whether, whether the [216] exhibit goes back or not. It just says you have the right to introduce the convictions.

MR. GOAD: So it says introduce, I heard the words introduce and present certified copies. Doesn't that entail that it's going to be an exhibit?

THE COURT: Well, I don't know. You've got to have those things in order to, to tell the jury at all.

MR. GOAD: Right.

THE COURT: And you've got to give your notice which I didn't bother to read. *"At such proceeding, the Commonwealth shall present"* . . .

MR. BAUGH: I'm going to amend my request, Your Honor. If the Commonwealth is willing to give us a

printed list of the offenses of which he has been convicted and the dates of conviction, we can send it back.

THE COURT: All right. If it suits you.

MR. GOAD: All right. You want to read those and see if they're . . .

MR. BAUGH: Well, I . . .

MR. GOAD: I'll amend (A) and (B) to say this.

MR. BAUGH: I thought you were just going to do [217] a list of he was convicted of this offense on this date and this offense on this date, this offense on this date and it's going to be like six (6) or seven (7) lines and that's it.

MR. GOAD: So you don't want me to put *"Order of the Court of Common Pleas of County of Greene, Pennsylvania"*?

MR. BAUGH: Do you know what that means? I don't know what that means. It sounds rather base though and common.

MR. GOAD: I could say the Defendant was convicted in the, in that court on June 5th, 1970, for a prison breech?

MR. BAUGH: I would, I would suggest that we just put this date, this offense. The Defendant, the Defendant has previously been convicted of this date, this offense; this date, this offense; this date, this offense; this date, this offense. If you want to put in Common Pleas of Pennsylvania, go ahead, I don't care. I don't even know what that is.

MR. GOAD: O. K.

MR. BAUGH: So far be it for me to base a [218] decision on ignorance.

MR. GOAD: So should I go back to my office and fix this up?

THE COURT: Uh-huh.

MR. BAUGH: If you don't mind.

THE COURT: Why don't you do that? Before you go, because this is going to take a minute, everybody agree that the Commonwealth has a right to open and close?

MR. BAUGH: Oh, yes. No. No. Wait a minute. That statute doesn't say that. No. That's been a while since we had that one (1). I believe, we ought to check that statute, I believe they have the right, I get the last word on this one (1). I think it says they get to open and close.

THE COURT: Let's see what it says. Get the Rules, let's see what the . . .

MR. BAUGH: Let's see what it says. It's been a while. It's always nice to look at the book.

THE COURT: I just want to know. Let's just go off the record while we find this.

MR. BAUGH: Shall we go off? No objection.

[219] OFF THE RECORD

* * *

IN THE COURTROOM – IN OPEN COURT

THE COURT: All right. The jury has knocked on the door. Everyone's present. We'll bring the jury in.

THE JURY RETURNS TO THE COURTROOM AFTER INDICATING THAT THEY HAVE FINISHED THEIR DELIBERATIONS AT 4:25 PM

THE COURT: All right. You may be seated. The jury has returned. Mr. Martin, apparently you have the jury's verdict. Are you the foreman of the jury?

JURY FOREMAN MARTIN: Yes, sir.

THE COURT: Has the jury reached its verdict?

JURY FOREMAN MARTIN: Yes, sir.

THE COURT: Would you present that then to the Clerk for us please? We'll let the Clerk read the verdict.

All right. Would you read the verdict please?

[220] THE CLERK: We, the jury, find the Defendant guilty of burning a cross in a public place with the intent to intimidate as charged in the indictment, signed Dannie Martin, Foreman.

THE COURT: Mr. Martin, is that the jury's verdict?

JURY FOREMAN MARTIN: Yes, sir. It is.

THE COURT: And, members of the jury, so say you all?

(The entire jury indicates an affirmative response.)

THE COURT: All of you agree with the verdict?

(The entire jury indicates an affirmative response.)

THE COURT: All right. We're going to ask you to retire for another few minutes and we will then enter the penalty stage of these proceedings and so while you're, while you're in recess, don't discuss what the penalty should be until you've heard the additional evidence and the arguments of the attorneys. You may now retire and we should be with you in about five (5) minutes.

[221] THE JURY RETIRES TO THE JURY ROOM, OUT OF HEARING OF ANY MATTERS HELD IN THE COURTROOM

THE COURT: Did you get the stipulation ready?

MR. GOAD: I'm about halfway done.

THE COURT: All right. Would you go finish that? And then let me know when you have it ready and we'll bring in the jury. Mr. Goad, the procedure with regard to who opens and closes was as I previously announced.

MR. BAUGH: You get to open and close.

THE COURT: All right. Let me know when they come back.

THE COURT STANDS IN RECESS

THE COURT: All right. Let's bring in the jury.

THE JURY RETURNS TO THE COURTROOM AT 4:55 PM

THE COURT: All right. You may be seated. Members of the jury, first let me apologize for the time [222] we took bringing you back to the courtroom. However, we were getting together a stipulation and ultimately, I

think it will save, save time with regard to the presentation of the balance of the case.

At this point, I want to again explain to you a verdict form. The verdict form that you will take to the jury room with you this time is *"We, the jury, having found the Defendant guilty of burning a cross in a public place with the intent to intimidate, fix his punishment at"* and we have several blanks or three (3) lines basically where you can fix the punishment. After you've arrived at the punishment that the jury has fixed, then the foreman should fill in this verdict form and sign the form.

Instruction #11. The Court instructs the jury that you have found the Defendant guilty of burning a cross in a public place with the intent to intimidate. You should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

Instruction #12. The Court instructs the jury [223] that you have found the Defendant guilty of the felony of placing a burning cross in a public place with the intent to intimidate. Upon consideration of all the evidence you have heard, you shall fix the Defendant's punishment at: (1) a specific term of imprisonment but not less than one (1) year nor more than five (5) years; or (2) confinement in jail for a specific time, but not more than twelve (12) months; or (3) a fine of a specific amount, but not more than two thousand five hundred dollars ($2,500.00); or (4) confinement in jail for a specific time, but not more than twelve (12) months and a fine of a specific amount, but not more than two thousand five hundred dollars ($2,500.00).

I now invite your attention to the closing arguments of the attorneys, opening statement of the attorneys. Excuse me.

MR. GOAD: To begin, I would have the exhibit.

THE COURT: You know, actually, I guess you should have, before I read the instructions, do you wish to present an opening statement before you present the evidence?

MR. GOAD: Yes. I would.

[224] THE COURT: All right. Then why don't you go ahead and do that and then we will . . .

MR. GOAD: Then after the opening statement, then we'll present the exhibit.

THE COURT: Well, each of you have the right to make the opening statement.

MR. GOAD: Yes.

THE COURT: All right. You may proceed.

* * *

OPENING STATEMENT BY MR. GOAD:

Ladies and gentlemen of the jury, you've now found the Defendant guilty of burning a cross with the intent to intimidate and, as you heard the Judge say, now the punishment is a range of one (1) year to five (5) months in the penitentiary or up to twelve (12) months in jail or a fine of two thousand five hundred dollars ($2,500.00), either or both. If you recall earlier this morning, we said you could punish the Defendant for as little as a dollar

($1.00) or as high as five (5) years in [225] the state penitentiary.

I submit to you that in consideration of his prior criminal history that we will be introducing that the Defendant should be incarcerated for the offense that he's committed.

And also in consideration of the punishment, you must remember the seriousness of the event that happened here on August 22nd, 1998. At that Klan rally, you had serious threats – you had serious threats of killing people and that, with all the other statements that he made, and his prior criminal history warrants his incarceration.

Now, I'm not going to suggest to you a specific amount of incarceration. I'm going to leave that to you in your best judgment, but his prior criminal history and what happened there that night warrants incarceration.

Thank you.

* * *

THE COURT: Do you wish to open?

MR. BAUGH: I do, Your Honor.

[226] THE COURT: All right.

* * *

CLOSING ARGUMENT BY MR. BLACK [sic]:

A cross burning is not new. It has been used in the past to scare people. The legislature has decided that for the worst cross burning imaginable the maximum is five (5) years in prison, which is a significant period of time, by

the way. The worst cross burning imaginable would probably entail people going up in the dead of night, sneaking into someone's yard. burning a cross, standing around, scaring people, forcing people to move, threatening their family, making people surrender the privacy of their home and run. That's the worst case scenario and that's five (5) years.

In this case, we don't have the proximity. We don't have people going onto someone else's property without permission. We don't have it directed at an individual or a family. According to the government's response, they say that the, Mr. Black by his actions [227] intent [sic] to intimidate all African-Americans in this community, all Hispanics in this community and all whites who disagree with his racist views, close quote. This is standing in the middle of a field yelling.

And for those reasons I would say that if, if the worst case scenario is as I described to you – going into someone's yard, placing them in fear, night riders, scaring people, making them flee – if that's the worst case scenario, this is not it.

Is it wrong? You've brought in a verdict and I accept that. You said it is. You said he committed a crime. But you've also said you'll consider the full range of punishment and the Congress has set, the legislature set a one dollar ($1.00) fine to five (5) years. If that's the, if that's the maximum, if that's the worst, then I would submit this is far from the worst and I would ask you to assess a fine. Thank you.

* * *

THE COURT: All right. Commonwealth, do you have evidence that you would like to present at this time?

[228] MR. GOAD: Yes, sir. I have a stipulation of the parties I'd like to introduce as an exhibit and also read.

THE COURT: You may proceed to read the stipulation.

MR. GOAD: The parties stipulate that the Defendant had previously been convicted of the following criminal offenses:

(1) In the Court of Common Pleas of the County of Greene, Pennsylvania, on May 25th, 1970, the Defendant was convicted of felony prison breech.

(2) In the Court of Common Pleas of the County of Greene, Pennsylvania, on June 5th, 1970, the Defendant was convicted of adultery and bastardy. This offense was also referred to as fornication and bastardy.

(3) In the Court of Common Pleas of the County of Greene, Pennsylvania, on July 24, 1971, the Defendant was convicted of felony burglary.

(4) In the Court of Common Pleas of the County of Greene, Pennsylvania, on July 24, 1971, the Defendant was convicted of felony larceny.

(5) In the Court of Common Pleas of the County [229] of Greene, Pennsylvania, on June 28, 1979, the Defendant was convicted of felony burglary.

(6) In the Court of Common Pleas of the County of Greene, Pennsylvania, on June 28, 1979, the Defendant was convicted of criminal escape.

(7) In the Court of Common Pleas of the County of Greene, Pennsylvania, on July 26, 1968, the Defendant was convicted of felony larceny.

And then I would have the exhibit.

THE COURT: All right.

MR. BAUGH: Based upon the documents tendered, Your Honor, we would so stipulate.

THE COURT: Very well. Thank you. We will mark that as Commonwealth's Exhibit #5.

COMMONWEALTH'S EXHIBIT #5, the written stipulation of the parties of the Defendant Barry Elton Black's prior criminal record, is received and filed as a part of the Court record in this case.

THE COURT: Any further evidence with regard, on behalf of the Commonwealth?

[230] MR. GOAD: No further evidence.

THE COURT: All right. Any evidence on behalf of the Defendant?

MR. BAUGH: No evidence on behalf of the Defendant, Your Honor.

THE COURT: All right, gentlemen. We're ready then to hear the closing arguments. You may proceed.

* * *

CLOSING ARGUMENT BY MR. GOAD:

Ladies and gentlemen, as I stated a moment ago, we'll be brief. In consideration of his prior criminal history that you have now heard – seven (7) prior convictions, one (1) of

which was a criminal escape, another one (1) a felony prison breech and all the others ones that are listed out in the exhibit – that makes the punishment more severe for this case.

And then, as I argued before, you must consider the circumstances of what happened that night. This was the burning of the cross with the intent to intimidate and [231] with serious intimidation that night. I mentioned previously about what was spoken in the rally of kill the Negroes with a .30/.30 rifle. Well, let's not forget what the Defendant himself said. The Defendant himself said *when is the white man going to stand up to the blacks and the Mexicans in this neighborhood* and all of the other racial hatred that was spoke at the meeting there that night.

That is an appropriate consideration for punishment. Now, this wasn't a low intimidation in my viewpoint. I submit that it's serious because you have intimidation of the most serious nature of murder and in consideration of that and his prior history, I ask you to impose incarceration.

Thank you.

* * *

THE COURT: Mr. Baugh?

* * *

[232] CLOSING ARGUMENT BY MR. BAUGH:

The Commonwealth is asking you to punish this man for the words spoken by someone else and they just did that. They're asking you to punish him because he's a Klansman and that's not right. They just said that you should punish him because someone else got up and said

people ought to die. I'm not surprised the Klan says that, but no one (1) says he said it and it is wrong to convict people based on association. The only thing I'm asking you to do is to base it on what he said and did. Period.

The Commonwealth has argued well, if he's a member of an organization and that organization gets up and says something, he's accountable for it. That is not true. His statements and no one (1) heard a threat come out of his mouth and for that reason, I would submit, this is not the worst case.

Is racial animus bad? Yes. It's bad. And I'm not trying to say it's not. Is the Klan bad? In my estimation, yes, but that's not what he's been convicted of. He's been convicted of his personal intent and his [233] personal actions and I would ask that you not rise to the bait given you by the government to prosecute him because of his membership in an organization even if the organization is bad and even if he is a member of it and even though he may have advocated possibly, I don't know. It's pure speculation.

He can only be convicted and prosecuted for his actions alone. Thank you.

* * *

THE COURT: Any further comment from the Commonwealth?

MR. GOAD: Just briefly, Judge.

* * *

CLOSING ARGUMENT BY MR. GOAD:

Of course, let's not forget that Mr. Black was the one (1) responsible for this rally and took responsibility for the

burning of the cross and all that [234] along went with it, with everything that was carried about that evening and then let's talk about what his statements were. As I mentioned to you before, he himself made this statement about *when is the white man going to stand up to the blacks and the Mexicans in this neighborhood* and everything else that he said that night and he should be held accountable for that.

Thank you.

* * *

THE COURT: All right, gentlemen. Thank you for those observations. Members of the jury, I told you about your verdict form and I've read the instructions to you. You may now retire and when you've arrived at the verdict, the foreman should fill in the verdict form, sign it and let us know when you finish. You may now retire.

THE JURY RETIRES TO THE JURY ROOM TO BEGIN THEIR DELIBERATIONS ON THE SENTENCING PHASE AT 5:08 PM

THE COURT: All right. If you don't go too far, [235] we'll try to let you know when the jury returns. We'll stand in recess while they're deliberating.

THE COURT STANDS IN RECESS AWAITING THE JURY'S VERDICT

* * *

IN THE COURTROOM – IN OPEN COURT

THE COURT: All right. Bring in the jury.

THE JURY RETURNS TO THE COURTROOM AFTER INDICATING THAT THEY HAVE FINISHED THEIR DELIBERATIONS AT 5:52 PM

THE COURT: All right. You may be seated. The jury has returned. Mr. Martin, as foreman of the jury, has the jury arrived at its verdict?

JURY FOREMAN MARTIN: Yes, sir.

THE COURT: All right. Madame Clerk, would you read the verdict for us please?

THE CLERK: We, the jury, having found the Defendant guilty of burning a cross in a public place with [236] the intent to intimidate, fix his punishment at two thousand five hundred dollar ($2,500.00) fine, signed Dannie Martin, Foreman.

THE COURT: Mr. Martin, is that the jury's verdict?

JURY FOREMAN MARTIN: Yes, sir.

THE COURT: Members of the jury, so say you all?

(The entire jury indicates an affirmative response.)

THE COURT: All right. Any motions while the jury's here?

MR. BAUGH: None from the defense, Your Honor.

THE COURT: All right. Members of the jury, thank you for your attendance. Someone, I believe the bailiff indicated that it was your desire not to be photographed and

you did not wish to make any statements to the press. Is that your desire?

(The entire jury indicates an affirmative response.)

THE COURT: All right. In that case, I'm going to let, we have some things we need to do to wrap up the case. We thank you for your attendance and we'll let you [237] depart by the back way and, members of the press, I direct that they not be photographed or any effort be made to interview the jury as per their request.

Members of the jury, you may now depart.

THE JURY LEAVES THE COURTHOUSE

THE COURT: All right. The jury has now departed. Any motions on behalf of the Defendant?

MR. BAUGH: Your Honor, we would make the motion to set aside the verdict as contrary to law and evidence. We would additionally re-urge our previous motions and objections made in pre-trial and trial specifically and most importantly our First Amendment issues.

THE COURT: All right. We hashed and re-hashed those.

MR. BAUGH: Yes, sir.

THE COURT: And the Court will deny the motions as I've previously ruled and adhere to its prior rulings.

MR. BAUGH: Then at this time, Your Honor, we'll, well, we'll just leave. We'll think about appeal later.

[238] THE COURT: Well, let me, let me say some things. Of course, this is a felony conviction.

MR. BAUGH: Yes, sir.

THE COURT: Has, even though there's no jail, he does have the right for a pre-sentence report. Do you waive that?

MR. BAUGH: Yes, Your Honor.

THE COURT: All right. Commonwealth waive its right to have a pre-sentence?

MR. GOAD: Yes.

THE COURT: All right. Let me advise Mr. Black that you do have the right to appeal and, of course, the verdict will go down today against you, so you'll have thirty (30) days to note your appeal. Failure to note that appeal within the thirty (30) days is jurisdictional. So if it's not done, you don't make up your mind, you lose your right to appeal.

MR. BLACK: Yes, sir.

THE COURT: Of course, you're being represented by counsel at this point, but you do understand that if you're indigent and you don't have the funds with which to perfect your appeal, if you qualify as an indigent, the [239] Court will consider that request for a court-appointed counsel to assist you in the appeal. If that occurs, if you do qualify, the attorney will be appointed; the transcript will be typed without initial expense to you and that will be made available. If you prevail, of course, you pay no costs. If you don't prevail on the appeal, the cost of the attorney will be added as court costs and the cost of typing the transcript will be added.

Do you have any questions about things I've now told you?

MR. BLACK: No, Your Honor, just is . . .

MR. BAUGH: Your Honor, I have advised Mr. Black that until such time as he makes his decision, I am his counsel. I will advise him of constitutional rights including his right to appeal.

THE COURT: All right. Thank you very much. Then let me, does he have the money to pay his fine today?

MR. BAUGH: No. He does not, Your Honor.

MR. BLACK: I have some money, Your Honor.

MR. BAUGH: Your Honor, I would ask the Court to suspend the imposition of the fine until such time as, if we do give notice of appeal, until such time as those [240] issues are resolved.

THE COURT: I'll receive that as a motion to stay the execution pending the . . .

MR. BAUGH: Please, Your Honor.

THE COURT: That decision. Any objection to an initial stay of thirty (30) days pending the filing of the notice of appeal?

MR. GOAD: No, sir.

THE COURT: That motion is granted and thereafter as long as he is actively involved in the appeal, in the appellate process, then it will be stayed pending that appeal.

MR. BAUGH: We'd also ask the same for costs.

THE COURT: Yes.

MR. BAUGH: Thank you.

THE COURT: All right. Let the record show that throughout the proceedings on all points relevant unless the accused waived his right to be present, that the Defendant and his attorney were both present throughout the entire proceedings.

MR. BAUGH: So stipulated, Your Honor.

THE COURT: Thank you very much. You will have [241] to, well, until, and I've just imposed sentence. In Virginia, once a person is convicted of a felony, you must submit to a DNA test being made, a blood sample being withdrawn for the purpose of a DNA test. The test that we have will be available on July 20th at nine (9:00) AM at the Health Department here in the first floor of F1 Building C, what is it, first floor, Building C of this building. So if you, can you report back here at nine (9:00) AM on July 20th?

MR. BAUGH: Either he'll report, Your Honor, or we'll make arrangements with the Sheriff's Office to have him submit a sample in the jurisdiction where he lives or something, if it's available.

THE COURT: There's one (1) other alternative. In lieu of, of going to the Health Department, he can go to our Regional Jail . . .

MR. BAUGH: Today?

THE COURT: Which is in Dublin. Well, I don't think they'll do them after hours.

MR. BAUGH: Oh, that's right.

THE COURT: Can you help me with that? Do you know?

[242] BAILIFF: No, sir. I don't believe they do them after hours.

THE COURT: I don't think they do either. If he would make arrangements . . .

MR. BAUGH: Could he do it tomorrow, Your Honor?

THE COURT: O. K. At the Regional Jail?

MR. BAUGH: At the Regional Jail or the Health Department tomorrow, whichever is most convenient.

THE COURT: Well, . . .

MR. BAUGH: Oh, they only do it July 20th at the Health Department.

THE COURT: Right.

MR. BAUGH: The Regional Jail in Dublin. We'll get directions from the Sheriff's Office to get to Dublin.

THE COURT: All right. We will fax them the test, I'll sign the form, give him a copy and we'll fax it and if he'll report to the jail tomorrow to give the test then they'll take care of that.

MR. BAUGH: Thank you, Your Honor.

THE COURT: All right. Anything further?

MR. GOAD: You may have said this and I missed it. Did the Court formally receive the verdict and make a [243] finding of guilty?

THE COURT: The, no, I guess I really didn't. I did overrule his motion. So, for the record, the Court now enters up a finding of guilt in accordance with the jury verdict and imposes a fine of twenty-five hundred dollars ($2,500.00). As I indicated before, that will be stayed for the purpose of appeal.

MR. BAUGH: Thank you, Your Honor.

THE COURT: Thank you.

* * *

AND THIS MATTER WAS HEREBY CONCLUDED ON THIS DATE AND AT THIS TIME AND NO FURTHER EVIDENCE WAS TAKEN THEREIN.

* * *

[244] COMMONWEALTH OF VIRGINIA

COUNTY OF CARROLL

I, DEBBIE A. WILSON, do hereby certify that the foregoing report of the trial by jury in the case of Commonwealth of Virginia, Plaintiff, vs. Barry Elton Black, Defendant, was personally recorded by and transcribed by me and is a full, complete and accurate record of the proceedings held on the 23rd day of June, 1999, to the best of my knowledge, belief, and ability.

Given under my hand this 23rd day of August, 1999.

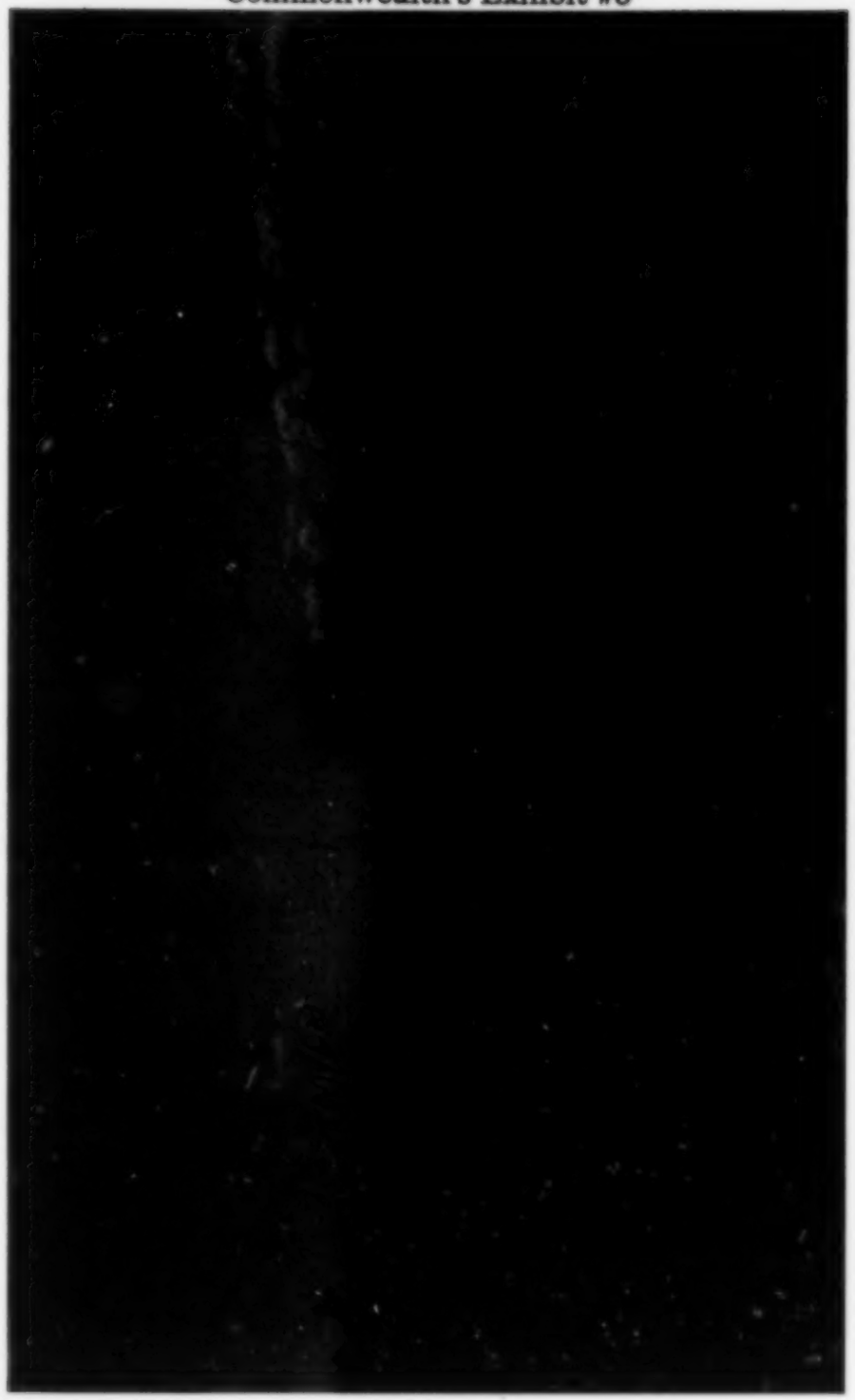
/s/ Debbie A. Wilson
DEBBIE A. WILSON
Court Reporter and
Notary Public

My commission expires April 30, 2001.

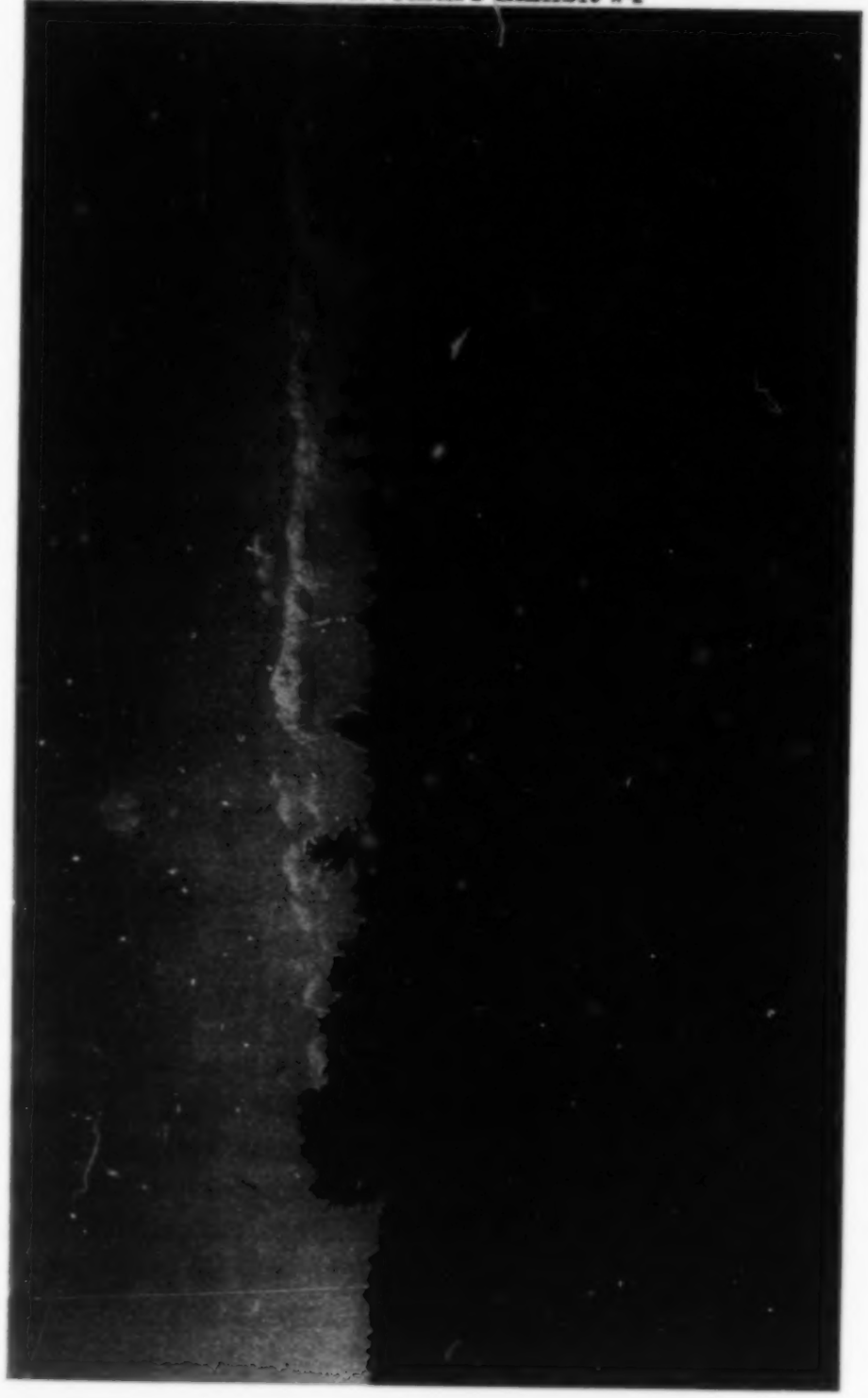
Commonwealth's Exhibit #1

Commonwealth's Exhibit #2

Commonwealth's Exhibit #3



Commonwealth's Exhibit #4



Commonwealth v. Black

INSTRUCTION NO. 3

THE COURT INSTRUCTS THE JURY THAT:

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

INSTRUCTION NO. 7

THE COURT INSTRUCTS THE JURY THAT:

It is not necessary that each element of the offense be proved by direct evidence, for an element may also be proved by circumstantial evidence. You may convict the defendant on circumstantial evidence alone, or on circumstantial evidence combined with other evidence, if you believe from all the evidence that the defendant is not innocent beyond a reasonable doubt.

When the Commonwealth relies upon circumstantial evidence, the circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt.

The evidence as a whole must exclude every reasonable theory of innocence.

INSTRUCTION NO. 8

THE COURT INSTRUCTS THE JURY THAT:

The defendant is charged with the crime of placing a burning cross in a public place with the intent to intimidate. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant burned or caused to be burned a cross in a public place; and

(2) That he did so with the intent to intimidate any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the defendant not guilty.

INSTRUCTION NO. 8-A

THE COURT INSTRUCTS THE JURY THAT:

Intimidate, as used in the term "with the intent to intimidate" means a motivation to intentionally put a person or group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria.

INSTRUCTION NO. 9

THE COURT INSTRUCTS THE JURY THAT:

The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent.

INSTRUCTION NO. 10

THE COURT INSTRUCTS THE JURY THAT:

A "public place" is any place open to the knowledge or view of all; generally seen or known; without privacy or concealment.

VERDICT FORM

We the jury find the Defendant guilty of burning a cross in a public place with the intent to intimidate, as charged in the indictment.

/s/ Dannie Martin
FOREMAN

We the jury find the Defendant not guilty.

_____
FOREMAN

PUNISHMENT VERDICT FORM

We the jury, having found the Defendant guilty of burning a cross in a public place with the intent to intimidate, fix his punishment at $2500.00 FINE.

/s/ Dannie Martin
FOREMAN

CONVICTION AND SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT
OF CARROLL COUNTY

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 035

Hearing Date: June 23, 1999
Judge: DUANE E. MINK

COMMONWEALTH OF VIRGINIA

v.

BARRY ELTON BLACK, DEFENDANT

This day came the defendant, who appeared in person with his attorney, David P. Baugh. The Commonwealth was represented by Gregory G. Goad. Whereupon the accused was arraigned and after private consultation with his said attorney, pleaded not guilty to the Indictment, which plea was tended by the accused in person.

After being advised by the Court of his right to trial either by jury or by the Court and, after consultation with counsel, the accused did not waive his right to trial by jury and to which the Court approved.

The Court then impaneled twenty qualified jurors, free from exception for the trial of the defendant. Whereupon the Attorney for the Commonwealth and the attorney for the defendant each alternately exercised their rights to strike the names of four veniremen from the panel, as provided by law, and the remaining twelve jurors, constituting the jury for the trial of the defendant, were duly sworn.

After opening statements, the evidence was presented by the Commonwealth and the defendant.

At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated to the record, which motion was overruled and exception was noted.

At the conclusion of all the evidence, the attorney for the defendant renewed his motion to strike the Commonwealth's evidence on the same grounds, which motion was overruled and exception was noted.

After hearing the evidence, the instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open Court, in the following words:

Costs. The defendant shall pay costs of $4107.50. The defendant is Ordered to pay unto the Commonwealth its costs in this case pursuant to law including any Court appointed counsel fee allowed by this Court. The defendant was advised by the Court that his driver's license shall be revoked according to Virginia Code Section 46.2-395, and that he is subject to further charges as set forth in Virginia Code Section 19.2-358 for failure to pay according to the direction of the Court. The defendant shall pay according to a schedule to be filed with the Court for monthly payments which are due each month until all costs are paid in full.

And it is further Ordered that pursuant to Section 19.2-310.3 of the Code of Virginia, as amended, the defendant shall have a sample of his blood taken for analysis. The Court Orders the defendant to cooperate fully and promptly in permitting the said withdrawal of blood as

required by law. The Court Orders the defendant to report to the New River Valley Regional Jail on June 24, 1999, at 9:00 a.m., for the withdrawal of the said sample of blood in accordance with law.

Thereupon, the jury was discharged.

And counsel for the defendant moved the Court to stay the execution of the fine pending the defendant's decision regarding appeal and the perfection of said appeal if so noted, and which motion is granted. The Court further Orders a stay in the payment of costs to the Commonwealth pending the perfection of an appeal if noted.

The Court certifies that at all times the defendant was personally present with his attorney who capably represented him.

June 28, 1999 — DATE
ENTER: /s/ Duane E. Mink — JUDGE

DEFENDANT IDENTIFICATION:

Alias: none
SSN: 159-40-8378 DOB: 1/6/48 Sex: male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: $2,500.00 fine

TOTAL SENTENCE SUSPENDED: none

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 19th *day of* December, 2000.

Barry Elton Black, Appellant,

against Record No. 1581-99-3
Circuit Court No. CR 98-461

Commonwealth of Virginia, Appellee.

From the Circuit Court of Carroll County

Before Chief Judge Fitzpatrick,
Judges Coleman and Frank

For the reasons stated in *O'Mara v. Commonwealth*, 33 Va. App. 525, 535 S.E.2d 175 (2000), we affirm the judgment of the trial court.

This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk
By: /s/ Marty V. P. Ring

Deputy Clerk

VIRGINIA: CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA v JONATHAN STEPHEN O'MARA, Defendant.	)	RECORD CR98-3193
COMMONWEALTH OF VIRGINIA v RICHARD J. ELLIOTT, Defendant.	)	RECORD CR98-3631

Before Hon. Alan E. Rosenblatt, Judge
Virginia Beach, Virginia
January 20, 1999

APPEARANCES: Commonwealth's Attorney's Office (Mr. Afshin Farashahi and Mr. Scott C. Vachris), attorneys for the Commonwealth.

Stallings and Richardson (Mr. Kevin E. Martingayle), attorneys for defendant O'Mara.

Zoby and Broccoletti (Mr. James O. Broccoletti), attorneys for defendant Elliott.

[2] THE COURT: All right. These are the cases of Commonwealth of Virginia versus Elliott and Commonwealth of Virginia versus O'Mara.

Is the Commonwealth ready?

MR. VACHRIS: Yes, sir.

THE COURT: Are the defendants ready?

MR. MARTINGAYLE: Yes, sir.

MR. BROCCOLETTI: Yes, sir.

THE COURT: All right. The issues of constitutionality have been submitted to the court and they have been briefed, and the matter is on today for a ruling; and since I don't know what she took down, apparently counsel doesn't desire any further oral argument; is that correct?

MR. FARASHAHI: That's correct, Judge.

MR. MARTINGAYLE: Yes, sir, that's correct.

MR. BROCCOLETTI: Yes, sir.

THE COURT: Okay. Well, I have just two questions then; and pardon me if they sound elementary, but I just want to cover all the bases here. The first one – the first question is directed towards the Commonwealth, and it's simply this. Does the Commonwealth concede that we're talking about symbolic speech here that requires a First Amendment analysis?

MR. FARASHAHI: Judge, we're not talking [3] about symbolic speech here. What we're talking about – as we argued, we're talking about conduct that is not – that is not symbolic speech. It's simply conduct that is prohibited by the statute. Your Honor, since you asked that question

if I can just say one thing I think that follows along with it.

THE COURT: Say anything you like. Make sure I understand what you're saying. Are you saying that we don't even have a First Amendment issue here?

MR. FARASHAHI: Well, Judge, we have a First Amendment issue in the sense that the court has to look at First Amendment cases; but I don't think we have a First Amendment issue and, in fact, that the statute prohibits speech if that's what you're asking.

THE COURT: Well, it's not speech. It prohibits cross burning.

MR. FARASHAHI: That's correct.

THE COURT: The question is, Is that akin to speech? Is that symbolic speech? And that's why we have a First Amendment.

MR. FARASHAHI: Judge, it can be speech under certain circumstances; and I think what I'm going to say follows along with the question that you're asking. Your Honor, the case – the only case really here is R.A.V. v. Minnesota from the supreme court in 1995. [4] That is really the major case, obviously, for the court to consider. Judge, in that case the U.S. Supreme Court struck down the statute in question – the cross-burning statute; and the court's ruling, Your Honor, was based on the fact that that – that statute prohibited conduct – the type of conduct that was designed to express, and then that was laid on the statute. That was designed to express hatred towards certain groups as the court laid it out; and, Your Honor, the Supreme Court in that case said that that was – the court was – or the statute was prohibiting speech in

the sense that it was content based. In other words, it laid out certain types of speech, certain issues and said that you cannot – you cannot prohibit – you cannot do these things if you're going to express an opinion on this topic.

Furthermore, Your Honor, in that case, the court held that the statute in question – not only was it content based, but it was also viewpoint based. In other words, the state in that case had taken a position on the – on the speech, on the viewpoint. Basically the state had taken one side and said you cannot do a certain act to express hatred towards a certain group. In other words, as the court said, it didn't prohibit acts that would actually favor those [5] groups. So it was content based and it was viewpoint based.

Your Honor, I think the main distinction of the statute of Virginia, which I don't think the defense –

THE COURT: Wait a minute, Mr. Farashahi. You've gotten a little ahead of me. Hold on a second. You're jumping ahead of me because the reason for that whole analysis in R.A.V. was that the court felt that the statute, while it regulated conduct, was regulating what we call symbolic speech.

MR. FARASHAHI: That's correct.

THE COURT: And then it went on to do an analysis on the statute, and that's fine; and I'll hear all that, but what I want to know is isn't that – that's the point we're starting with. You agree, do you not, that this is symbolic speech and it requires a First Amendment analysis? That's all I'm asking. I'm not – I'm not asking how it's going to come out.

MR. FARASHAHI: I guess I disagree with you to some extent, Judge. I think, obviously, it requires a First Amendment analysis; but I don't think the starting point is symbolic speech. I think – as you know, the court has held that threats of violence are not protected by the First Amendment. So that's not [6] symbolic speech.

THE COURT: Burning a cross is, though, isn't it?

MR. FARASHAHI: Well, again, Judge, this is akin to that, to threat of violence – to that type of speech.

THE COURT: Okay. All right. Go ahead.

MR. FARASHAHI: Maybe I'm misunderstanding what you're saying; but for example, Judge, in the Fourth Amendment context when the court analyzes an encounter between a police officer and a citizen, the court – the first question that the court asks itself is this. First of all, was this a seizure. In other words, is this something that would require to look at the Fourth Amendment law. If the court says no, it is not a seizure, that it was a consensual encounter, then we don't look at the Fourth Amendment law. So in a sense, Judge, in that case, yeah, we do do a Fourth Amendment analysis to, first of all, determine whether there was a seizure; and then if there was a seizure, then determine whether there's reasonable suspicion or probable case, whatever the circumstance may be.

Similarly, Judge, in this case I think you're right. We have – obviously, we have to look at it from a First Amendment viewpoint to a First Amendment [7] analysis; but I think the first question would be whether it's symbolic

speech and then move on to the analysis. I don't know if that answers your question.

THE COURT: Okay. I'll take that.

All right. Mr. Martingayle.

MR. MARTINGAYLE: Yes, sir.

THE COURT: Do either of you want to respond to what he said?

MR. MARTINGAYLE: I'll say very briefly, Judge, I think under the R.A.V. decision, Sheldon, Vawter – those are three decisions that I briefed in addition to all of the cases contained on Page 3 of my opening brief which give examples of conduct which equal speech. This is clearly a First Amendment analysis.

Keeping in mind that we don't get into any of the facts of this case, we have to assume realistic scenarios. For instance, the kind of activity that we know that this statute was designed to prohibit; and one of the things clearly it was designed to stop was Klan rallies. We can come right out and say that. They didn't want to have Klan rallies; and so what happens at a Klan rally is they burn a cross on somebody's property; so everybody else who's there participates in the burning, of course, is now going to [8] be guilty of a crime. That's one of the things clearly this was designed to stop.

Now, the act of burning that with permission on somebody else's property, Judge, is not likely to produce an immediate threat of harm as required by Brandenburg; and that's the sort of example that you see the courts struggle with in all the cases that have dealt with this issue.

I would finally point out – and then I'll address your question, Judge – I would finally point out that if you compare – if you take our briefs and you turn to the pages where we've actually cited the entirety of the Virginia statute compared with the Florida statute, compared with the Washington statute, compared with all of them, the Virginia one is probably the least protective of free speech. It's the only one that has no requirement of lack of permission to be on somebody else's property. So, in other words, under the Virginia statute, if you go onto somebody else's property with permission, you have violated the Virginia statute. That is not something that you'll find in any of the others, and I quoted the entire text of the Florida and Washington ones. The Commonwealth's brief only gave you the part that looked similar to Virginia, but what they left out but I included was the [9] part that talked about permission or lack thereof.

Lack of permission is one more step toward what's required by Brandenburg. Brandenburg requires that there be a threat of – and I quote – imminent lawless action – all three of those words. So first the actor must have the intent to produce such action; and, secondly, it must be likely – not possible, but likely that the words or the form of expression will produce the imminent lawless action; and that's where the Virginia statute completely falls apart.

I would note finally and then I'll sit down, Judge, that since R.A.V. was decided, there have been no amendments to the Virginia statute, nothing done to bring it into line with the requirements of R.A.V.; and I think it is clearly a content-based regulation in violation of the constitution.

THE COURT: Well, that raises a question – perhaps another question, and that's one that's sort of been hanging back there, Mr. Martingayle; and that is you start off your brief addressing Brandenburg. Is Brandenburg addressed in R.A.V.?

MR. MARTINGAYLE: Judge, I'd have to look at the body of R.A.V. again to give you a –

THE COURT: Well, R.A.V. and the cases you cited were fighting words cases. I am having a hard [10] time understanding how Brandenburg even comes into this case. It seemed to me that in R.A.V. the court laid it out pretty well as to what should and should not be considered when you review a statute of this nature, and – I don't know. Maybe it was cited in there, but I don't remember. Does anybody remember?

I mean here we're dealing with a statute which very clearly in my mind at least is directed at words, despite what the Commonwealth says, and actions that inflict injury or intend to incite immediate breach of the peace. That's right out of Chaplinsky. So it would seem to me that a fighting words analysis is what we're looking at here in this case. Do you agree or disagree with that?

MR. MARTINGAYLE: Well, what we're looking at, Your Honor, certainly Chaplinsky is part of the equation; but the Brandenburg standard is what shows the balance between hate speech or hate conduct that is also speech – expressive speech and the First Amendment. There has to be that balance, and so what Brandenburg does is tell us what factors are required in order to take the hate speech from being protected to not protected. When do we cross over that line? That's what Brandenburg is all about; and I don't think that any First Amendment analysis

on this subject is [11] complete without looking at that case, particularly given the strong language and strong things said in the Brandenburg case that were protected; and that was speech that seemed to advocate immediate action, and that was protected; but I think that the main thrust, Judge, is Brandenburg is sort of a stage-setting case from my point of view.

The problem they've got I think is R.A.V. As I pointed out, particularly in my reply brief, this statute plays favorites. It plays favorites exactly as prohibited by R.A.V., and it does so in two ways. One, it protects certain groups. It doesn't protect others, and I don't know if you've had a chance to go through the examples that I put together of things which you could do to intimidate other groups of people which would not be at all illegal. That was in my reply memorandum, Judge; and I'll take you to that. That's on – Page 9 I go through several examples that are kind of twisted things to try to make up to put into a brief; but I was trying to come up with shocking things that someone could do that are expressive conduct, obviously which would have the effect of intimidating somebody that aren't illegal; and so what we've got is certain groups – for instance the Catholics or the police officers or in one instance black people – who [12] don't get protection under this Virginia statute so it plays favorites, but it also plays favorites in the mode of expression.

For instance, you can – I gave the example of the cross burning part of it is illegal under the Virginia statute; but what about where someone does something like takes a black mannequin and desecrates that right in front of or next door to people that are black? That clearly is a mode of expression that is not illegal according to the Virginia

statute that is actually more offensive than the Virginia statute. That's playing favorites.

THE COURT: So that means that the statute's underinclusive.

MR. MARTINGAYLE: It does mean that the statute would be underinclusive in that regard as to the mode of expression. It also means that it's going to be underinclusive in terms of the groups that it protects. It can be under and overinclusive as Justice Scalia wrote.

THE COURT: This statute makes it against the law for anyone to burn a cross for any reason whatsoever –

MR. MARTINGAYLE: Yes, sir.

THE COURT: – with the intent to intimidate. [13] So how is any – it may not cover all circumstances that you can dream up of intimidation, but it clearly makes illegal any act of burning a cross with the intent to intimidate. So it covers all classes.

MR. MARTINGAYLE: The difficulty here, Judge, is that intent to intimidate alone is not enough. That's another one of the problems of the Virginia statute because that's where it falls short of what is required in Brandenburg, and that's why you have to set the stage with Brandenburg. Brandenburg requires more than just the intent to intimidate; but, in addition to that, the threat of imminent lawless action or behavior. That's something missing. They never get to the next step.

Now, what the general assembly tried to do rather innovatively but I would argue ineffectively is that they then flipped the burden. They say, Well, you have to intend to do something; and, by the way, we're going to assume

that intent; and that's the issue that was briefed by Mr. Broccoletti; but –

THE COURT: I'll get to him.

MR. MARTINGAYLE: But, Judge, I would argue that the weight of the authority out there, reading all these cases together, taking a look at the R.A.V. decision, the analysis made by the Maryland Court of [14] Appeals in Sheldon, the analysis of the New Jersey Supreme Court in Vawter, even the cases cited by the Commonwealth as their favorable authority – T.B.D. and Steven from Florida and California respectively, the Talley decision out of Washington – all of them point out things in their statutes, even the ones that uphold statutes, that are different and are strikingly important and different from the Virginia statute.

For instance, the T.B.D. decision in Florida, 1995, permissive burnings are okay under that statute even if you do intend to intimidate somebody. If it's with permission, it's okay. That's not the law in Virginia. That was the part left out of it when they cited the statutory language in T.B.D. I included it in my reply brief.

In the Steven case, California, 1994, once again under that statute, permissive burning's okay. Not so in Virginia; and, by the way, Steven tries to make it a little more evenhanded in terms of what kinds of expression by saying crosses and other religious symbols. I think they recognized the problem with playing favorites with crosses; so you could burn the Virgin Mary by the Catholics, but you can't burn a cross. That doesn't make any sense.

THE COURT: You might need another statute. [15] You need to go to Richmond and say, We need another statute banning the burning of the Virgin Mary.

MR. MARTINGAYLE: Well, that may be the case, Judge; but until there is that other statute, what we've got is a playing favorites situation, which is what R.A.V. says you can't do. Justice Scalia wrote a long opinion, and it's in many ways difficult to digest.

THE COURT: Very difficult.

MR. MARTINGAYLE: But the one part that comes out very clearly is you can't play favorites. That's what he says. That's what he writes, and those are his words. He talks about playing favorites, and the Commonwealth concedes that in the brief that you can't play favorites.

Finally, I would point to the Talley decision. Section 1 was upheld, but that requires the context from Brandenburg. Section 2 was stricken. That was the content-based part of the Washington statute that had the automatic presumption attached to it, so that's important. The Talley court in Washington also made that distinguishing analysis, and that's on Page 5 of my reply brief.

Finally, I'd point out that McDermott also cited by the Commonwealth as favorable authority, which [16] is an Eighth Circuit decision, states that cross burning may or may not be expressive conduct. You have to have the proof of the imminent threat of lawless action; and that's right out of McDermott.

So I defy the Commonwealth to come up with a case where you've got all this authority out there and this Virginia statute which has no requirement of context, no

requirement of imminent lawless action where even permissive cross burnings are illegal. I defy them to come up with an opinion that says that it's okay. It's clearly not constitutional under the weight of authority out there, and I haven't seen them cite any cases with a statute remotely like the Virginia one.

THE COURT: Do you want to respond?

MR. FARASHAHI: Judge, I'll just make three quick points. First, Your Honor, in Sheldon and Vawter and in those cases that the defense cites, first of all, Judge, they're state supreme court cases; but I think the distinction is that in those cases what they were screening against I believe in Sheldon was religious symbols, which is exactly what R.A.V. said you can't do; and also, Judge, in Vawter they talked about exposing others to threats of violence or hatred on the basis of race, color, creed or religion, which [17] is again similar to the R.A.V. case. Judge, that again goes to what R.A.V. was talking about where you can't pick a content – you can't pick a topic and say you can't express views on this topic and also you can't take the side on those topics – take the side of those issues.

Finally, Judge, if, as defense says, what's fatal to the statute here is that there is nothing in here about saying with or without permission, Judge, I think when the statute says with the intent of intimidating any person, I think maybe – I think that takes care of that – that criticism of the statute; but, Judge, I do think that R.A.V. is the case here; and the Virginia statute addresses – although, Judge, the statute was passed, it's my understanding, prior to R.A.V. coming out; but the Virginia statute addresses the two flaws in the R.A.V. statute –

that is, that it does not pick certain issues and said you can express – you can express your feelings on these issues; and also, Judge, it does not pick sides on those issues; and I think that's a very important distinction and I think that's why it complies with what the court laid out in R.A.V.

MR. MARTINGAYLE: Judge, just briefly. If you go to Page 6 of my brief – and this is from the [18] Talley decision, a case cited by the Commonwealth. It talks about near the bottom, Even if construed to address only fighting words as the Minnesota Supreme Court did with the Saint Paul ordinance, the statute is still unconstitutional under the R.A.V. analysis because even fighting words may not be regulated based on their content.

Now, we know what this statute in Virginia is doing. As I pointed out in my brief, Roger Grute, Professor at W&L, in Criminal Offenses and Defenses in Virginia, states Section 18.2-420 through 18.2-423, although not so stating, are directed at the activities of supremist groups; and is there really any doubt about that? We don't have to take it at face value that, well, there's nobody in particular in mind. We know that there are particular people in mind.

As I said, the general assembly got innovative; but I don't think it passes constitutional muster. Just because they didn't name a particular group that might be offended doesn't mean that we have to ignore the fact that this is the activities of supremist groups that are designed to be prohibited and that supremist groups target certain people; and clearly that – one other point raised by Mr. Farashahi is that the intent to intimidate would take out [19] permissive cross burnings. Well, we know that

permissive cross burnings get prosecuted and that if a Klan rally, for instance, is taking place, they're clearly intending to send an intimidating message out there into the world. What's missing, of course, is the immediate threat of imminent lawless action. They're sending out a message, We don't like certain people. That's what Klan people do. They target groups they don't like. It's hate; and I think morally it's wrong, but it's also protected; but it's also illegal under the Virginia statute, and that's the problem. It can't be both. It can't be protected under the First Amendment and then outlawed by the Virginia legislature. They don't have that authority.

THE COURT: Okay. Mr. Broccoletti, on your issue – and I know what the words are in the statute, but my question is this. Did you happen to notice – you might have cited it in your brief, but I don't remember. Did you happen to notice if there's a Virginia jury instruction on this point?

MR. BROCCOLETTI: Yes, sir.

THE COURT: And, as you know then from looking at the instruction, it tells the jury that they may infer. That is typically how we handle these type of burden-shifting – this kind of burden-shifting [20] language if it is burden-shifting language from statutes. That's how it would be handled in this case – as an inference, not as a presumption.

MR. BROCCOLETTI: I think that the court before it gets to that point on the instruction, according to the Wilson case, which again has been cited – Wilson talks about that there has to be a rational connection between the facts proved in the case and the presumption was raised

or the inference that the court would seek to instruct the jury on and that the latter did not flow more likely from the former, so I think to some degree the court has to wait to hear the evidence in the case.

THE COURT: That was going to be my next point.

MR. BROCCOLETTI: Yes, sir.

THE COURT: This is an issue that really can only be raised after the evidence is heard, isn't it?

MR. BROCCOLETTI: To some degree, yes, sir; but I wanted to alert the court to that ahead of time so the court would be prepared for that; but I do think that we have to wait and see if there is a rational connection between the evidence produced and the inference that they seek to draw and instruct the jury [21] on.

THE COURT: All right. Thank you. I was going to get to that. All right. Anything else?

MR. FARASHAHI: No, sir. (The hearing recessed at 10:28 a.m. At 11:25 a.m. hearing continued as follows:)

THE COURT: All right. State statutes are entitled to a presumption of constitutionality. That's Horne book law. We all know that. The defendants maintain that as a content-based regulation of speech, this particular code section 18.2-423 is not entitled to such a presumption. They contend the statute violates the First and Fourteenth Amendments of the Constitution and have moved to dismiss this case. For the reasons that follow, the court is going to overrule the defendants' motions.

I found the discussion this morning interesting. However, burning a cross in my opinion constitutes symbolic speech because it is an activity by which a person clearly intends to convey a particularized message; and there is a great likelihood that those who view the message will understand it. Therefore, it is an activity that may be protected by the First Amendment.

Further, the statute in question, 18.2-423, [22] is a regulation of conduct/speech that is content based, it is not content neutral. Clearly, in enacting the statute, the state – clearly, the state has adopted this regulation of statute because of disagreement with the message it conveys and because of its communicative impact. There can be no doubt – at least there's no doubt in my mind that Code Section 18.2-423 was enacted to censure a particular message of intimidation, which, as I said, makes – does not make it content neutral but content based; but because we're dealing with a message of this nature and because we're dealing with a particular message of intimidation, we're not dealing with a situation such as that expressed in Brandenburg. The Brandenburg analysis is not appropriate to the facts and to the statute in this particular case. What we're talking about is a content-based regulation of speech which must be analyzed by the court, and all such content-based regulations are presumptively unconstitutional. However, there are permitted exceptions in a few limited areas.

As the supreme court said in Chaplinsky, It is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited [23] classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include

the lewd and obscene, the profane, the libelous and the insulting, or, quote, fighting words, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Fighting words are words which by their very utterance inflict injury and intend to incite immediate breach of the peace. Code section 18.2-243 is clearly a legislative attempt to regulate fighting words. The statute does not regulate all cross burnings; it only regulates those done with the intent of intimidating any person or group of persons. Thus, the statute falls within the fighting words exception.

The leading case concerning the regulation of fighting words is well known in R.A.V. In that case the Supreme Court held that even though fighting words fall within a constitutionally proscribable category, the state may not regulate such speech based on [24] hostility, or favoritism, towards a nonproscribable message. In effect, the court ruled that statutes that regulate even fighting words must be neutral and cannot discriminate against certain viewpoints. It ultimately determined that the statute in R.A.V. was unconstitutional because it only prohibited fighting words that insult on the basis of race, color, creed, religion or gender.

As Justice Scalia explained, quote, The reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content

embodies a particularly intolerable and socially unnecessary mode of expressing whatever idea the speaker wishes to convey. Saint Paul has not singled out an especially offensive mode of expression. It has not, for example, selected for prohibition. Only those fighting words that communicate ideas in a threatening as opposed to a merely obnoxious manner. Rather it has proscribed fighting words of whatever manner that communicate messages of racial, gender or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.

In the court's opinion, the Virginia statute [25] differs significantly from the Minnesota statute. First, it does not – first, it does single out an especially offensive mode of expression by prohibiting conduct that is done with the intent to intimidate. Second, the statute is not limited to messages of racial, gender or religious intolerance. There is no selectivity in 18.2-243. The statute prohibits the entire class of speech. The statute does not, for example, proscribe only cross burnings done with the intent to intimidate someone on the basis of race or on the basis of national origin. The Virginia statute prohibits all cross burnings done with the intent to intimidate, regardless of the message the perpetrator is attempting to convey and regardless of the social or political viewpoint the cross burner was trying to express. All that matters is that he attempted to send his message, whatever it was, with the intent to intimidate someone.

Now, the defendants have argued because the Virginia statute prohibits only cross burnings, it favors the cross as a religious symbol and is, therefore, content based and unconstitutional under R.A.V. This argument, however, confuses the regulation of a manner of expression with the

regulation of a message. The statute regulates the intimidating manner [26] of expression, which is entirely permissible. The mere fact that the statute does not proscribe all fighting words of all kinds that convey messages of intimidation does not mean that the state is playing favorites. This is simply a constitutionally underinclusive regulation of a larger set of clearly proscribable speech. As explained in R.A.V., the regulation of fighting words may address some offensive instances and leave other equally offensive instances alone; and, as long as those instances of fighting words are regulated are done so in a neutral manner with regard to the message conveyed, there is no constitutional violation. Burning a cross with an intent to intimidate is an extremely hazardous manner of expression. There is a tremendous possibility for terror and violence. Because the statute evenhandedly bans all cases of this particularly dangerous form of expression, it passes constitutional muster.

On the second issue, the defendants have contended that the statute states that the burning – since the statute states that the burning of a cross shall be prima facie evidence of an intent to intimidate, it unconstitutionally shifts the burden of proof to the defendant. It is well settled that the prosecution bears the burden of proving every [27] element of a crime beyond a reasonable doubt. However, inferences and presumptions are a staple of our adversary system of factfinding; and where these presumptions are rebuttable, quote, the general rule is to give such presumptions permissive or burden-of-production-shifting effect only.

The statute in this case creates a rebuttable presumption. The jury, if there is one, will be instructed that the burning of a cross by itself is sufficient evidence from

which you may infer the required intent. The jury may infer, not must infer. Indeed, the presumption could be ignored by the jury even if there was no affirmative proof offered by the defendants in rebuttal.

Recognizing that the statute creates only a permissive inference, it is inappropriate at this time to consider the defendants' argument. As the Supreme Court has instructed, our cases considering the validity of permissive statutory presumptions such as the one involved here have rested on an evaluation of the presumption as applied to the record before the court. None suggests that a court should pass on the constitutionality of this kind of statute on its face. To rule on the defendants' argument at this time, as I think was conceded by Mr. Broccoletti, would be to rule [28] on the constitutionality of the statute on its face. Accordingly, because the party challenging the invalidity of the statute must demonstrate its invalidity as applied to him, it will be necessary to determine the facts of the case, which can only be accomplished by the defendant going to trial. For those reasons, the motions of the defendants are denied.

MR. BROCCOLETTI: If the court would note our objection and exception.

MR. MARTINGAYLE: For the record, note our exception.

Judge, just for the record, I wanted to make the record clear that while you were out and for the benefit of opposing counsel, I had your clerk convey to you that we did find a cite in R.A.V. of Brandenburg at 2553 in the Supreme Court Reporter Addition, Footnote 4; and I don't know if you were made aware of that or not, but I wanted to make sure –

THE COURT: I think you made the point; so, yes, I did see it.

MR. MARTINGAYLE: Yes, sir.

(The hearing was concluded at 11:36 a.m.)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: JANUARY 20, 1999
JUDGE: ROSENBLATT

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT

INDICTMENT FOR:
CONSPIRACY
ATTEMPTED CROSS BURNING TO INTIMIDATE

ORDER – CASE NO.: CR98-3631

Court Reporter: Ronald Graham & Associates, Inc.

This day came A. Farashahi and S. Vachris, attorneys for the Commonwealth, the defendant, in person, and J. Broccoletti, attorney for the defendant.

After receiving briefs and hearing argument of counsel, the Court denied defendant's motion to dismiss the above charges for the reasons stated on the record.

This matter is presently set for motions on February 2, 1999.

ENTERED: 1-25-99

/s/ AR
JUDGE

VIRGINIA: CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA	)	EXCERPTS
vs	)	CR98-3631
RICHARD J. ELLIOTT,	)	
Defendant.	)	

Before Hon. Frederick B. Lowe, Judge; and jury

Virginia Beach, Virginia

February 22, 1999

APPEARANCES: Office of the Commonwealth's Attorney (Mr. Afshin Farashahi and Mr. Scott C. Vachris), attorneys for the Commonwealth.

Zoby and Broccoletti (Mr. James O. Broccoletti), attorneys for the the defendant.

* * *

[2] JAMES STANLEY JUBILEE, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. VACHRIS:

Q Good afternoon. Please state your name for the jury, and spell your name for the court reporter.

A My name is James S. Jubilee. Spelling is J-a-m-e-s. Middle is S for Stanley. Last name is Jubilee. J-u-b-i-l-e-e.

Q Mr. Jubilee, how old are you?

A I'm forty-two.

Q Mr. Jubilee, where do you live?

A I live at 2044 Munden Point Road, Virginia Beach, Virginia 23457.

Q And how long have you lived at this address?

A Approximately four months. Four and a half months now.

Q And prior to living there what town did you live in?

A Prior to living there?

Q Yes.

A I lived in Virginia Beach prior to that.

[3] Q And where did you live before that?

A In the Kempsville – you mean before then?

Q Yes.

A I was in California. Los Angeles.

Q And, Mr. Jubilee, who do you live at your house – who lives at your house on Munden Point Road?

A My wife, and I have two sons that reside with me at my home on Munden Point Road.

Q And just briefly. What made you move back from California back east?

A I was born and raised here. Went to school here and finished college here. All my family is here; and living in California with all the crime and the negativity that you have in California, I wanted to come back to a more pleasant environment. A better environment to raise my family and my sons, and hopefully two other kids on the way as well.

Q And what type of neighborhood is Munden Point Road?

A Now or then?

Q I mean is it very suburban? Is it more rural? Just give a general description.

A It's more a rural setting. It's out in the country. We call it – it's ideal to have for my sons to run, to have fun, to burn energy off. We have two dogs now, [4] a cat. We figured it would be a great family setting.

Q And you lived there for how long before May 2nd?

A It was about four months before May 2nd. We haven't been there long, but before May 2nd was about four months.

Q Before May 2nd did you have an opportunity to meet any of your neighbors?

A Yes. We met the neighbors, the Elliotts, next door.

Q And did you have conversations with them?

A I had a conversation with Mrs. Elliott one day; and we were talking, and I inquired about the fact that there was some shooting going on in the rear of the home; and I was trying to inquire as to why it was there or what was

going on just because of my sons in the yard, and they play sometimes; so for security purposes I wanted to find out just what was happening; and so I inquired, and she said it was Mr. Elliott's hobby. He basically goes in the back and he has a firing range.

My concern at that time was – which I didn't mention to her – was that there were other people coming by who were also going back there and using the firing range, and I always felt like you have to be a professional or you have to be trained I think to actually use a firearm in the [5] presence of other people be it next door – it doesn't matter. Bullets go wherever they go.

Q Did you voice any concerns to Mrs. Elliott?

A At that time I didn't because I was new to the neighborhood, not knowing exactly the people next door. Could have very well been a thing that would have been safe. I didn't know; so I didn't say a lot along those lines.

Q Was this conversation cordial?

A Cordial. Absolutely. Very cordial.

Q What type of work do you do, Mr. Jubilee?

A I'm a realtor with Remax Central Realty in Virginia Beach.

Q And drawing your attention to the evening of May 2nd, were you working that day?

A Yes, I was.

Q And about what time did you get home?

A May 2nd I got home about 10:15, 10:30 I guess that evening from work.

Q And anything unusual when you got home?

A No. Just a normal day and normal evening. Coming home with the family.

Q Anything unusual happen that evening while you were at home?

A No. I got home in the evening. We had dinner and watched a little bit of TV with the kids and went to bed [6] about 11:30, 12:00, thereabouts.

Q Did you have to go to work the next morning?

A Yes, I did.

Q It was a Sunday morning?

A Yes.

Q About what time did you leave the house?

A I left the home that morning about, oh, I think it must have been at about 8:15, 8:30, thereabouts.

Q Okay. And explain to the members of the jury what happened when you left the house.

A As I was in my vehicle pulling out of my driveway – just a normal thing of driving out – and I looked to the right side, and I see something standing up at the right side which is not nothing that's normally there. I didn't know what it was, and looked over and took a double take because I couldn't believe what I really saw. I thought it might have been some of the kids were out playing or something like that; and turned out, I talked to the kids, and it wasn't anything that they were playing or anything; so it turned out that it was a cross; and the closer I got to the cross, I recognized that the cross was – looked like

somebody was trying to burn the cross; so I became furious.

Q How far was this cross from your house?

A Less than twenty feet from my house.

Q And when you saw the cross, what did you do [7] with it?

A Picked it up, in anger broke the cross, was furious; and the first thing I thought was I don't want my family to see this. I didn't want my sons, especially my nine-year-old, to see this; so what I did was took the cross and carried it to the garage and locked the door.

Q Why did you think they had tried to burn it?

A Because of the burn spots that were on the cross.

Q Did you notice anything else unusual about the yard?

A Yeah. It looks as though they were in the truck or something. They drove in the yard, and this is my assumption based on what I've seen.

Q Did you see tire tracks?

A I saw tire tracks. Yes.

Q And had the tire tracks been there the preceding night?

A Before then, no. They weren't. They had been in and circled around.

Q And you testified that you broke the cross over your leg?

A Yes, I did.

Q Why did you do that?

A Just angry. I was upset because I'm not – we [8] came to Virginia, again, to get away from all the riffraff of L.A. We've seen all this sort of thing happen in L.A.

Q After you put the cross in the garage, how did you feel after that? What transpired after that?

A I was worried number one. I didn't want them to know about the cross, but I had to go to work as well; so after I went to work, I thought to myself I need to call my wife and let her know what's going on because she was not home at the time. I didn't know what would be the next phase of this if you will. I had no idea. This has never happened to me or my family or anyone that I know before; so I had no idea what the next thing would be; so my thought was I need to call the wife so she can inform the kids and be aware of what's going on if something does happen.

At that point and stage I became very nervous, not knowing what else was going to happen; and the thought is you look at these things and you see it on TV. You don't normally ever know anybody who has a cross burned in your yard other than you see it on TV; and when you see [9] television, it tells you that it's just the first round out of it.

* * *

Q Mr. Jubilee, I'm going to show you – and I know it was previously marked as Commonwealth's Exhibit Number 1. What do you see before you?

A Two pieces of sticks with nails in them.

Q Do they look familiar to you?

A Yes, they do.

Q How do they look familiar to you?

A It looks like it's the same cross that I broke over my knee in my front yard.

Q And when you first saw it – the cross – was it in that condition?

A No, it wasn't. It was – it was in my front yard, and it was erected. It was standing up in my front yard about twenty paces from my home.

Q And you testified earlier that you saw some burn marks on the cross. Do you see the burn marks on that [10] exhibit?

A Yes, I do.

Q Please point them out to the ladies and gentlemen of the jury.

A All this.

Q You – while you have the cross, you want to show them how it looked when you found it on your yard?

A It was kind of like – yeah. It was like – the burn was at the bottom. It was like that. Like that.

Q All right. And where did you place this?

A In my garage after I broke it across my knee.

* * *

Q Mr. Jubilee, I'm going to show you a photograph. Please explain to the members of the jury what you see in that photograph.

A That's my front yard with my flowers and my [11] home. Pine trees, apple trees in the front yard as well.

Q Let me ask you a favor. Let me give you a pen. I want you to mark on the picture where you saw the cross that morning.

THE COURT: Just put an X there if you would.

THE WITNESS: Right there.

THE COURT: Can you see where the X is, Mr. Vachris?

MR. VACHRIS: Yes, sir. Thank you. Your Honor, we would move to introduce the photographs as Commonwealth's Exhibit Number 2.

* * *

Q Mr. Jubilee, prior to May 2, 1998, did you ever meet and come in contact with David Targee?

A No.

Q Prior to that same day did you ever come in contact with Jonathan O'Mara?

A No.

Q Prior to that date did you ever come in contact [12] with Richard Jason Elliott?

A No.

Q Okay. Did you ever see – when you said you spoke with the Elliotts, did you ever meet any of their family in the – family members besides Mrs. Elliott?

A Initially no.

Q Prior to May 2nd had you seen anybody else?

A Did I see anybody?

Q Yes.

A I've seen Mr. Elliott – the younger Elliott – where I have waved to him before from a distance, but never up front, up close.

Q Is he in the courtroom today?

A Yes. This young man right here.

MR. VACHRIS: Your Honor, please let the record reflect that the witness has identified the defendant sitting at counsel table.

THE COURT: All right.

BY MR. VACHRIS:

Q And you had never had any conversations with him?

A No.

Q But you had seen him, waved to him while you were driving away?

[13] A He was coming out of his driveway, which my driveway is parallel to his. I was coming in one day. He was coming out. I waved.

MR. VACHRIS: Thank you, Mr. Jubilee. Please answer any questions of Mr. Broccoletti or the court.

THE WITNESS: Yes.

CROSS-EXAMINATION

BY MR. BROCCOLETTI:

Q Mr. Jubilee, I take it, then, that you really had no words with, as you call him, the young man – the younger Elliott?

A Correct.

Q That be fair to say?

A That would be fair to say.

Q You mean he never spoke to you? You really never spoke to him?

A No. We spoke before.

Q Oh. You have spoken before you waved?

A Oh. In the wave. I'm sorry. Right.

Q But other than that?

A Not that I know of. No.

Q No type of ill will or malice directed from him towards you?

[14] A None that I know of. No.

Q No other kind of confrontation or problems that you knew of from him to you?

A No confrontation. No.

Q And you had never spoken to him and was upset with him or said anything to him?

A I had spoken to him before as I said a while ago.

Q Sir?

A I have spoken to him before.

Q Just to say hi as the neighbor would say hi?

A Yes.

Q And that would be the extent of it?

A Yes.

Q When you approached Mrs. Elliott in the courtroom sitting here today –

A Correct.

Q When you approached her, I think that you said that you had not voiced your concerns to her. Would that be correct?

A Be more explicit on your question.

Q At the time that you approached her after you first moved in, it was a visit from one neighbor to another?

A Well, she visit my home and – it wasn't a visit like that. Her dogs had crossed over in my yard, and [15] she was coming back to retrieve her animals. At that point in time we spoke.

Q And at that point in time you spoke to her about the – you had heard some shots or you had seen a shooting range that was in the backyard?

A Right.

Q But at that point you didn't voice any concerns that you told us about people walking in the back when the shooting was going on?

A I had voiced concerns about the shooting going on. I had not voiced concerns at the time or things about people going in the backyard.

Q You had not asked her to stop the shooting?

A No. I did not.

Q And you had not asked her to ask her son to stop the shooting?

A No. I did not.

Q When you said – when you spoke to her about the range, did you specifically mention in the context of her son?

A No.

Q You just talked about it in general?

A The context was not about her son. It was about the shooting. Period.

Q And just the range being there?

[16] A The range being there and the firing going on. It was my concern of safety for my children more than anything else.

Q So you never asked her to speak to – you never asked Mrs. Elliott to speak to Richard?

A I did not.

Q And you never made any complaints to her about Richard?

A I did not.

Q Did you – and you never spoke to Richard about that?

A No, I didn't.

Q Now, on the morning of the 2nd you – or the morning of the 3rd when you came out of your house and you saw these two pieces of wood put together, they weren't burning at that point, were they?

A No. They weren't burning.

Q There was no flame?

A No flame.

Q And you did not walk up to them to touch them to see if they were still warm to the touch?

A I did not.

MR. BROCCOLETTI: Thank you.

THE COURT: Anything else?

MR. VACHRIS: No redirect, Your Honor.

[17] THE COURT: All right. Thank you, Mr. Jubilee. You may step down.

MR. VACHRIS: Your Honor, we don't anticipate calling Mr. Jubilee again. We ask that he be excused.

MR. BROCCOLETTI: That's fine.

THE COURT: You are excused, Mr. Jubilee. You are free to go or remain in the courtroom. Whichever.

Who do you have next, Mr. Vachris?

MR. VACHRIS: Anticipate calling David Targee right now.

THE COURT: Well, I think we talked about at least your direct testimony; so let's go ahead with that.

MR. VACHRIS: Thank you, Your Honor.

DAVID TARGEE, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. VACHRIS:

Q Good afternoon. Please state your name for the [18] ladies and gentlemen of the jury, and spell it for the court reporter.

A David Targee. T-a-r-g-e-e.

Q David, how old are you?

A I'm seventeen.

* * *

[19] Q David, how long have you known the defendant?

A Probably about three, three and a half years.

Q Okay. How do you know him?

A I know him from school.

Q And did you see him on the evening of March 2, 1998?

A Yes, I did.

Q And where did you see him?

A He was at my house.

[20] Q I just want – his name is?

A Richard Elliott.

Q Is he in the courtroom today?

A Yes, sir.

Q Please point him out.

A He's sitting right there.

MR. VACHRIS: Your Honor, let the record reflect that the witness identified the defendant.

* * *

Q And what was going on at your house?

A I was having a party.

Q Okay. About how many people were there that night?

A I'd say no more than twenty at a time.

Q And was it Jonathan O'Mara there as well?

A Yes, sir.

Q Okay. And was there beer at that party?

A Yes.

Q Were you drinking a lot of beer that night?

A Yes. We all were.

Q Was Jonathan O'Mara drinking beer?

A Yes, sir.

[21] Q Do you remember if Richard Elliott was drinking?

A Yes.

Q And when the party started, do you remember anything unusual that Richard Elliott said?

A No. Not at first. I mean as the night progressed he said something about his neighbors were complaining about him shooting in his backyard or something like that. He wanted to get back at them for doing it or something to that effect.

Q And do you remember where he said that?

A Where?

Q Yes.

A He said it in my backyard.

Q And what was your reaction when he said that?

A I was like, All right. You know, whatever. You know, whatever you want to do; and I'd say probably twenty minutes later he come up to me and John and said that, Let's go burn a cross in their yard.

Q And when you say John, who do you mean by that name?

A Jonathan O'Mara.

Q Okay. What did you think when you heard that?

A I was like, well, you know, all right. Well, let's go. I didn't think of it to be that big of a deal at [22] the time.

Q Do you know who these neighbors were that the defendant was talking about?

A No. I did not.

Q Was there anybody else present when the defendant mentioned about burning a cross?

A No. It was just me, Richard, and John.

Q Were there other people at the party?

A Yeah. I think there was still a couple left.

Q Okay. And after the defendant coming up with this idea, what happened?

A Well, I'd say probably five minutes had gone by; and, you know, we got back together; and we went into the garage and built the cross.

Q Who built the cross?

A The three of us. Me, Richard, and John.

Q And how long did it take you?

A A matter of a couple of minutes.

Q And you sure that it was all three of you building it?

A Yes, sir.

Q And after the cross was built, what did you do?

A We went and got into my Bronco and proceeded down to Munden Point Road.

Q Who was driving?

[23] A I was.

Q Who else was in the car?

A Jonathan and Richard.

Q Where was Jonathan?

A He was in the passenger's seat.

Q Where was the defendant?

A He was in the back seat.

Q All right. Did you know how to get to Munden Point Road?

A Yeah. I know how to get to Munden Point Road.

Q What happened when you got to Munden Point Road?

A I turned down it, and I turned back to Richard and told him to point out the house when we get there.

Q And what did he say?

A He said, All right. So we kept on going a little ways down the road more, and he pointed over there. He said, That's where they live. That's where the asshole lives or assholes live or son of a – nigger lives or son of a bitch or something. I don't remember the exact words, but it was somewheres in that area.

Q Had you ever been to his house before?

A No, sir.

Q Do you remember approximately what time this was?

[24] A I don't know. I'd say between 12:00 and 12:30 maybe.

Q Evening?

A At night.

Q What did you do?

A When he pointed out the house, I drove up a little ways more; and I turned around on the road and come up and backed into the driveway.

Q And how far did you back in the driveway?

A Far enough to where my truck wasn't sitting on the road.

Q Okay. And what happened at that time?

A Richard handed the cross to John. John – if John asked him to give it to him or if Richard did it voluntarily – I don't remember exactly how that went about; and John reached into my center console, got the lighter fluid, and hopped out and went and put it in the ground.

Q Did you see him put it in the ground?

A I saw a little bit of it. I was looking more at the road more than I was at the yard.

Q Why were you looking at the road?

A See if anybody was coming.

Q And then did you see anything else that Jonathan did?

A I seen a little flicker of a flame; and he [25] hopped back in the truck and said, Let's go; and we left.

* * *

[61] [Direct – J. Luning]

Q Good afternoon. Would you please state your name; and spell your last name for the court reporter, please.

A It's Jennifer Luning. L-u-n-i-n-g.

Q And, Miss Luning, how old are you?

A Nineteen.

[62] Q Miss Luning, do you know a David Targee?

A Yes, sir.

Q And do you know a Jonathan O'Mara?

A Yes, sir.

Q And do you know a Richard Jason Elliott?

A Yes, sir.

Q And do you see Mr. Elliott here today?

A Yes, sir.

Q If you could, just tell us where he is sitting.

A He's right over there next to the door.

MR. FARASHAHI: For the record, the witness has identified the defendant.

THE COURT: All right.

BY MR. FARASHAHI:

Q Miss Luning, let's talk about Mr. Jonathan O'Mara; and let's go back to May of 1998. How did you know Jonathan O'Mara at that time? What was your relationship?

A We had been dating at that time.

Q And how long had you been dating?

A About five or six months. Five months.

Q Miss Luning, you are familiar with the cross-burning incident that happened on the night of May 2nd?

A Yes, sir.

Q And where were you that night?

[63] A At my house.

Q At your house?

A Yes, sir.

Q And that night did you speak with Jonathan O'Mara?

A Yes, sir.

Q And you spoke to him over the phone?

A Yes, sir.

Q After that night did you have occasion to have another conversation with Jonathan O'Mara?

A Yes, sir.

Q And how long after that night did you have this conversation with Jonathan O'Mara?

A A few weeks.

Q Okay. And where did this conversation take place?

A At his house. In his home.

Q What did you guys talk about?

A The cross-burning. I had asked who – if he knew who had done it, and he said that the three of them did.

Q Let's stop right there. Jonathan O'Mara said the three of them had done it?

A Yes, sir.

Q And which three was he talking about?

A Himself, David Targee, and Richard Elliott.

[64] Q And tell us what he told you what each person did.

A Well, he said David had been driving the vehicle and that he was in the passenger's seat and had actually gotten out of the truck.

Q He, being Jonathan O'Mara?

A Yes, sir; and that Richard was in the back seat.

Q This is Richard Elliott?

A Yes, sir.

Q And did he tell you anything else?

A As far as that night?

Q Yes, ma'am.

A No, sir.

Q Did you discuss or did he tell you whose idea it was or what prompted this to happen?

A He had said that before they actually went out and did it that there was a conversation taking place about Richard had been complaining or the neighbors had been complaining about shooting in the backyard guns.

Q Let's slow down here. Who did he say was complaining about – the neighbors?

A The Jubilee family.

Q And who was making – who was talking about the complaining neighbors?

[65] A Richard.

Q Richard Elliott?

A Yes, sir.

Q And what did Jonathan O'Mara say Richard Elliott said?

A That they had made complaints about the shooting, and that he had been upset – Richard was upset – that they were complaining; that they had complained.

* * *

COMMONWEALTH OF VIRGINIA

v.

Richard J. Elliott

INSTRUCTION NO. 1

The Court instructs the jury that the defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

[given
2/22/99
/s/ FBL]

INSTRUCTION NO. 5

The Court instructs the jury that the defendant is charged with the crime of attempted cross burning. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

1. That the defendant intended to commit cross burning; and

2. That the defendant did a direct act toward the commission of the cross burning which amounted to the beginning of the actual commission of the cross burning; and

3. That the defendant had the intent of intimidating any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

[given
2/22/99
/s/ FBL]

INSTRUCTION NO. 7

The Court instructs the jury that the intent required to be proved in an attempted crime is the specific intent in the person's mind to commit the particular crime for which the attempt is charged. In determining whether the intent has been proved, you may consider the conduct of the person involved and all the circumstances revealed by the evidence.

[given
2/22/99
/s/ FBL]

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: FEBRUARY 23, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT
SSN: 231-23-9687
DOB: 8/16/79

OFFENSE:	OFFENSE DATE:
CONSPIRACY	MAY 2, 1998
ATTEMPTED CROSS BURNING TO INTIMIDATE	MAY 2, 1998

CRIMINAL ORDER – Case No.: CR98-3631

Attorney for the Commonwealth:	S. Vachris and A. Farashahi
Attorney for the Defendant:	J. Broccoletti
Court Reporter:	Ronald Graham & Associates, Inc.

The defendant was again present, in person, and represented by counsel.

This day came again a jury sworn for the trial of this case.

The jurors were again sent to the jury room to consider their verdicts. They subsequently return in open court the following verdicts:

1. We, the jury, find the defendant **GUILTY** of Attempted Cross Burning to Intimidate.

2. We, the jury, find the defendant **NOT GUILTY** of Conspiracy.

After the jury returned its verdicts, the defendant moved to poll the jury and all the jurors affirmed their vote as to the verdicts.

A separate proceeding limited to the ascertainment of punishment was held before the same jury. After hearing further evidence and argument of counsel, the jurors were sent to the jury room to consider punishment. They returned in open court the following verdict:

1. We, the jury, having found the defendant **GUILTY** of Attempted Cross Burning to Intimidate, fix his punishment at: confinement in jail for 90 days and a fine of $2,500.00.

After the jury returned its verdict, no motion was made to poll the jury as to its verdict.

The Court confirmed the jury's verdict finding the defendant **GUILTY** of Attempted Cross Burning to Intimidate and **NOT GUILTY** of Conspiracy, of which charge the defendant stands acquitted.

The case was continued until April 26, 1999 for sentencing. The Court ordered the Probation Office to prepare a presentence report.

The Clerk shall send a copy of this order to the Probation Office of this Court.

Bond Status: The defendant was continued on the same bond previously posted.

ENTERED: 2/25/99

/s/ FBL
JUDGE

clerk: ssm

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: APRIL 26, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT
SSN: 231-23-9687
DOB: 8/16/79

SENTENCING ORDER – CASE NO.: CR98-3631

Attorney for the Commonwealth: A. Farashahi and S. Vachris
Attorney for the Defendant: J. Broccoletti
Court Reporter: Ronald Graham & Associates, Inc.

The defendant was again present and represented by counsel.

On February 23, 1999 the defendant was found GUILTY of the following offense:

OFFENSE (F/M)	DATE	SECTION
Attempted Cross Burning to Intimidate – F	5/2/98	18.2-423; 18.2-26

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

In accordance with the jury's verdict, the Court **SENTENCES** the defendant to:

Incarceration in the jail of this City for the term of 90 days and imposes a fine of $2,500.00.

The defendant shall pay costs of $1,393.00.

The Court, having been advised of the defendant's intention to appeal the matter to the Court of Appeals of Virginia, stayed the execution of the sentence and granted the defense attorney's motion to allow the defendant to remain on the same bond previously posted pending the appeal.

ENTERED: 5/6/99

/s/ FBL
JUDGE

clerk: ssm

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: APRIL 26, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
JONATHAN STEPHEN O'MARA, DEFENDANT
SSN: 226-35-0947
DOB: 7/15/79

SENTENCING ORDER – CASE NO.: CR98-3193

Attorney for the Commonwealth:	A. Farashahi and S. Vachris
Attorney for the Defendant:	K. Martingale and M. Del Duca
Court Reporter:	Ronald Graham & Associates, Inc.

The defendant was present and represented by counsel.

On February 22, 1999 the defendant was found GUILTY of the following offense:

OFFENSE (F/M)	DATE	SECTION
Attempted Cross Burning to Intimidate – F	5/2/98	18.2-423; 18.2-26
Conspiracy – F	5/2/98	18.2-22; 18.2-423

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

> Incarceration in the jail of this City for the term of 90 days and imposes a fine of $2,500.00 on each of the charges of Attempted Cross Burning to Intimidate and Conspiracy. The sentences shall run concurrently with each other for a total sentence imposed of 90 days in jail and $2,500.00 fine.

The Court **SUSPENDS** 45 days of the 90-day jail sentence and $1,000.00 of the $2,500.00 fine conditioned on the following:

1. **Good behavior.** The defendant shall be of good behavior for a period of 1 year.
2. **Costs.** The defendant shall pay costs of $433.00.

The Court, having been advised of the defendant's intention to appeal the matter to the Court of Appeals of Virginia, stayed the execution of the sentence and granted the defense attorney's motion to allow the defendant to remain on the same bond previously posted pending the appeal.

ENTERED: 5/6/99

/s/ FBL
JUDGE

clerk: ssm

COURT OF APPEALS OF VIRGINIA

Present: Judges Coleman, Bray and Bumgardner
Argued at Chesapeake, Virginia

JONATHAN STEPHEN O'MARA

v. Record No. 0992-99-1

COMMONWEALTH OF VIRGINIA

RICHARD J. ELLIOTT

v. Record No. 0997-99-1

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE RICHARD S. BRAY
OCTOBER 3, 2000

FROM THE CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH
Frederick B. Lowe, Judge

Kevin E. Martingayle (Stallings & Richardson, P.C., on briefs), for Jonathan Stephen O'Mara.

James O. Broccoletti (Zoby & Broccoletti, on brief), for Richard J. Elliott.

H. Elizabeth Shaffer, Assistant Attorney General; John H. McLees, Jr., Senior Assistant Attorney General (Mark L. Earley, Attorney General, on briefs), for appellee.

Pursuant to the terms of a plea agreement, Jonathan O'Mara pled guilty to "Attempted Cross Burning" and "Conspiracy to Commit a Felony," violations of Code §§ 18.2-423 and 18.2-22, respectively, expressly reserving the right to appeal a prior order of the trial court which

denied his challenge to the constitutionality of Code § 18.2-423. In a separate proceeding, Richard J. Elliott, codefendant with O'Mara, was convicted by a jury for attempted cross burning, after joining with defendant O'Mara in the unsuccessful challenge to the constitutionality of Code § 18.2-423 before the trial court.[1]

Accordingly, both O'Mara and Elliott (defendants) maintain on appeal "that the code section is unconstitutional as violative of the free speech and expression protections" guaranteed by both the United States and Virginia Constitutions. Joining the two appeals for resolution by this Court, we affirm the respective convictions.

I.

The substantive facts are uncontroverted. On the evening of May 2, 1998, defendants, together with "approximately fifteen individuals," were "consuming alcohol" at the Virginia Beach home of David Targee. When defendant Elliott expressed unspecified "complaint[s] . . . about his neighbor," James Jubilee, and his desire to "'get back' at him," someone "suggested that they burn a cross in [Jubilee's] yard." In response, Targee and defendants immediately constructed a crude cross in Targee's garage and proceeded in Targee's truck to the Jubilee home. Elliott "handed the cross" to defendant O'Mara, who erected and ignited it on Jubilee's property, and the three

[1] Although Judge Lowe presided at the trials of both O'Mara and Elliott, defendants' constitutional challenges were decided by Judge Alan E. Rosenblatt, following an extensive hearing and related argument and memoranda of law.

returned to Targee's residence. The respective records do not clearly specify Jubilee's race.

Jubilee later discovered the "partially burned cross" and notified police, resulting in the subject prosecutions for violations of code § 18.2-423 and the attendant conspiracy.

II.

Code § 18.2-423 provides:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Defendants contend that the statute impermissibly infringes upon expressive conduct, speech protected by the First and Fourteenth Amendments to the Constitution of the United States and Article I, § 12 of the Virginia Constitution, and, therefore, is "plainly unconstitutional."[2]

[2] "[L]itigants may challenge a statute on first amendment grounds even when their own speech is protected." *Coleman v. City of Richmond*, 5 Va. App. 459, 463, 364 S.E.2d 239, 241-42 (1988) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

"'In assessing the constitutionality of a statute . . . [t]he burden is on the challenger to prove the alleged constitutional defect.'" *Woolfolk v. Commonwealth*, 18 Va. App. 840, 848, 447 S.E.2d 530, 534 (1994) (quoting *Perkins v. Commonwealth*, 12 Va. App. 7, 14, 402 S.E.2d 229, 233 (1991)).

> "Every act of the legislature is presumed to be constitutional, and the Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable." *Bosang v. Iron Belt Bldg. & Loan Ass'n*, 96 Va. 119, 123, 30 S.E. 440, 441 (1898). "When the constitutionality of an act is challenged, a heavy burden of proof is thrust upon the party making the challenge. All laws are presumed to be constitutional and this presumption is one of the strongest known to the law." *Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959).

Moses v. Commonwealth, 27 Va. App. 293, 298-99, 498 S.E.2d 451, 454 (1998).

The First Amendment declares, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Fourteenth Amendment prohibits state action in violation of the First Amendment.

Similarly, Article I, § 12 of the Virginia Constitution establishes:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

"Our courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution." *Bennefield v. Commonwealth*, 21 Va. App. 729, 739-40, 467 S.E.2d 306, 311 (1996).

Although "[t]he First Amendment literally forbids the abridgement only of 'speech,'" the Supreme Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). "[C]onduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). In identifying expressive conduct, the Court must determine "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Id.* (alterations in original) (quoting *Spence*, 418 U.S. at 410-11). If so, a proscription of such activity by government "because of disapproval of the ideas expressed" is "content based" suppression of free speech, offensive to the First Amendment and "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

However, "our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any

benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Thus, First Amendment protection "does not include a freedom to disregard these traditional limitations," thereby allowing government to regulate obscenity, defamation, "fighting words," *id.* at 383 (citing *Chaplinsky*, 315 U.S. at 572), and threats of violence. *See id.* at 383, 388 (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)); *see also In re: Steven S.*, 31 Cal. Rptr. 2d 644, 647 (Ct. App. 1994) (holding that threats and fighting words are "remove[d] . . . from the scope of the First Amendment"); *Florida v. T.B.D.*, 656 So. 2d 479, 480-81 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996) (concluding that threats of violence and fighting words are proscribable because government has "valid interest" in protecting citizens both from fear of violence and violence).

The "'true threat'" doctrine articulated by the Supreme Court in *Watts* permits punishment of actual speech or expressive conduct "when a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict bodily harm." *In re: Steven S.*, 31 Cal. Rptr. 2d at 647 (citing *Orozco-Santillan*, 903 F.2d 1262, 1265-66 (9th Cir. 1990)). Similarly, the Court's "fighting words doctrine" expressed in *Chaplinsky* removes the shield of the First Amendment from "statements 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" *Id.* (quoting *Chaplinsky*, 315 U.S. at 572); *see Cohen v. California*, 403 U.S. 15, 20 (1971) (describing fighting words as expressions likely to provoke a violent reaction when directed to another).

Here, the provisions of Code § 18.2-423 specifically prohibit the burning of a cross "on the property of another, a highway or other public place," "with the intent of intimidating any person or group of persons." Historically, a flaming cross is "inextricably linked . . . to sudden and precipitous violence - lynchings, shootings, whippings, mutilations, and home-burnings," a "connection . . . [with] forthcoming violence [that] is clear and direct." *T.B.D.*, 656 So. 2d at 481. Hence, "a burning cross conveys ideas capable of eliciting powerful responses from those engaging in the conduct and those receiving the message." *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1992).

Manifestly, the pernicious message of such conduct, a clear and direct expression of an intention to do one harm, constitutes a true threat envisioned by *Watts*, irrespective of racial, religious, ethnic or like characteristics peculiar to the victim. Moreover, the attendant fear and intimidation subjects the victim to an immediate and calculated injury that invites a breach of the peace, fighting words within the intendment of *Chaplinsky*. Thus, although such expressive conduct doubtless constitutes speech, the prohibition of which unavoidably implicates content, the message is beyond the protection of the First Amendment and appropriately subject to proscription by government.

Defendants' reliance upon *Brandenburg v. Ohio*, 395 U.S. 444 (1969), to support the contention that Code § 18.2-423 unconstitutionally prohibits "merely intimidating someone," at once ignores the well-established symbolism of the burning cross and misapplies *Brandenburg*. *Brandenburg* addressed a challenge to the constitutionality of Ohio's "Criminal Syndicalism statute," which proscribed, *inter alia*, the "'advocacy . . . [of] the duty, necessity, or propriety of crime, sabotage, violence or

unlawful methods of terrorism as a means of accomplishing industrial or political reform.'" *Id.* at 444-45. Thus, the *Brandenburg* Court was concerned with the propriety of governmental restrictions on the "advocacy of the use of force or of law violation" in the context of a reform movement, an issue unrelated to the vile and malevolent expression contemplated by Code § 18.2-423. *Id.* at 447. Accordingly, the *Brandenburg* admonishment that states may "forbid or proscribe [such] advocacy" only if "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" does not similarly delimit proscribable threats and fighting words. *Id.*

Defendants' assertion that *R.A.V. v. St. Paul* "makes it clear . . . § 18.2-423 is unconstitutional" is, likewise, without merit. *R.A.V.* examined the constitutionality of a St. Paul, Minnesota ordinance, which provided, in pertinent part,

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 505 U.S. at 380 (citing Minn. Legis. Code § 292.02 (1990)). Unlike code § 18.2-423, which proscribes cross burnings with the intent to intimidate anyone, the St. Paul ordinance prohibited such "speech solely on the basis of the subjects the speech addresses," race, color, creed, religion or gender. *R.A.V.*, 505 U.S. at 381.

In declaring the enactment unconstitutional, the Supreme Court accepted the "authoritative statement" by the Minnesota Supreme Court "that the ordinance reaches only those expressions that constitute 'fighting words,'"[3] *id.* at 381, and reaffirmed the doctrine that "areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* – (obscenity, defamation, [threats, fighting words] etc.)." *Id.* at 383 (emphasis in original). However, the Court cautioned that such "categories of speech [are not] entirely invisible to the Constitution" and cannot "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383-84. Thus, when "St. Paul . . . proscribed fighting words of *whatever* manner that communicates messages of racial, gender or religious intolerance," the city impermissibly engaged in "[s]electivity [which] creates the possibility that [it] is seeking to handicap the expression of *particular* ideas." *Id.* at 394 (emphasis added); *see In re: Steven S.*, 31 Cal. Rptr. 2d at 649 ("speech and expressive conduct may be regulated [but] such regulation may not discriminate within that category on the basis of content"); *T.B.D.*, 656 So. 2d at 4781 (such regulation may not "play [ ] favorites").

In contrast, Code § 18.2-423 regulates, without favor or exception, conduct, which, despite elements of expression and content, is unprotected by the First Amendment.[4]

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[3] In overruling defendants' constitutional challenges in the instant prosecutions, Judge Rosenblatt also determined that code § 18.2-243 regulated fighting words.

[4] Post-*R.A.V.* decisions of other jurisdictions cited by defendant in support of a different result involve statutes substantially dissimilar

(Continued on following page)

Finally, defendant challenges Code § 18.2-423, first, as overbroad, regulating both protected and unprotected speech, and, secondly, as underinclusive, ignoring other modes of proscribable speech. However, overbreadth assumes constitutional dimension only when "'there [is] a realistic danger that the statute . . . will significantly compromise recognized First Amendment protections of parties not before the court.'" *Parker v. Commonwealth*, 24 Va. App. 681, 690, 485 S.E.2d 150, 154-55 (1997) (quoting *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984)). The prohibition of Code § 18.2-423 is expressly limited to a person or persons burning a cross with the specific intent to intimidate another, a threat and fighting words unworthy of First Amendment guarantees. Further, underinclusiveness is condemned by *R.A.V.* only if the result is content discrimination. *See R.A.V.*, 505 U.S. at 387. Code § 18.2-423 criminalizes a long recognized, particularly virulent and

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from Code § 18.2-423. *See Pinette v. Capitol Square Review and Advisory Bd.*, 874 F.Supp. 791 (S.D. Ohio 1994) (statute established permit requirements to conduct public assembly); *State v. Shelton*, 629 A.2d 753 (Md. 1993) (statute proscribed cross burning to protect property owners from unwanted fires and safeguard community from fires generally); *State v. Vawter*, 642 A.2d 349 (N.J. 1994) (statute proscribed messages based upon race, color, creed or religion); *State v. Talley*, 858 P.2d 217 (Wash. 1993) (statute proscribed certain conduct related to the race, color, religion, ancestry, natural origin, or mental, physical or sensory handicap of another).

In contrast, jurisdictions examining the constitutionality of statutes more akin to Code § 18.2-423 are in accord with our conclusion. *See In re: Steven S.*, 31 Cal. Rptr. 2d 644 (statute proscribed cross-burning intended to terrorize owner or occupant); *T.B.D.*, 656 So. 2d 479 (statute proscribed burning of cross on property of another without permission).

incendiary mode of proscribable expressive conduct, a prohibition free of content discrimination.

We, therefore, conclude that Code § 18.2-423 suffers from none of the several unconstitutional infirmities advanced by defendants. The statute targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence. The statute does not discriminate in its prohibition and is neither overbroad nor underinclusive.

Accordingly, we affirm the convictions.

Affirmed.

[IN THE SUPREME COURT OF VIRGINIA]

Present: Carrico, C.J., Lacy, Hassell, Koontz, Kinser, and Lemons, JJ., and Whiting, S.J.*

BARRY ELTON BLACK

v. Record No. 010123

COMMONWEALTH OF VIRGINIA

RICHARD J. ELLIOTT

v. Record No. 003014

COMMONWEALTH OF VIRGINIA

JONATHAN O'MARA

v. Record No. 010038

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE DONALD W. LEMONS
November 2, 2001

FROM THE COURT OF APPEALS OF VIRGINIA

In these appeals, we consider whether Code § 18.2-423, which prohibits the burning of a cross with the intent of intimidating any person or group of persons, impermissibly infringes upon constitutionally protected speech. The case of *Black v. Commonwealth* involves a Ku Klux Klan rally on private property with the permission of the owner, where a cross was burned as a part of the ceremony. The companion cases of *O'Mara v. Commonwealth* and *Elliott v. Commonwealth* involve the attempted burning of a cross in the backyard of the home of James S. Jubilee ("Jubilee"), an African-American, without permission. We conclude that, despite the laudable intentions of the General Assembly to combat bigotry and racism, the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content, and the statute is overbroad.

* Justice Keenan did not participate in the hearing and decision of this case.

FACTS AND PROCEEDINGS BELOW

The prosecutions of Richard J. Elliott ("Elliott") and Jonathan O'Mara ("O'Mara") arose from a single incident in the City of Virginia Beach. On May 2, 1998, Elliott and O'Mara attended a party at the home of David Targee ("Targee"). Elliott told several people at the party that his neighbor, Jubilee, had complained about the discharge of firearms in Elliott's backyard. In response, Elliott suggested they burn a cross in Jubilee's yard.

Elliott, O'Mara, and Targee hastily constructed a crude wooden cross in Targee's garage. While transporting the cross to the Jubilee home, Elliott referred to Jubilee with a racial epithet confirming Jubilee's race. Upon arriving at Jubilee's home, O'Mara put the cross in the ground and attempted to light it.

In addition to the epithet, the record is replete with references to Jubilee's race. In the Commonwealth's motion for joinder of defendants in the Elliott and O'Mara cases, it is stated: "Mr. James Jubilee is an African-American." A fire investigator with the City of Virginia Beach testified that Targee knew the Jubilees were black before he participated in the cross burning. Throughout

the O'Mara and Elliott prosecution, the Commonwealth referred to "burning a cross in a black family's yard." The questions of counsel and argument to the court are replete with references to race and racism.

Pursuant to a plea agreement, O'Mara pled guilty to attempted cross burning and conspiracy to commit cross burning, and was sentenced to 90 days in jail and a $2500 fine on each charge, with part of the time and fines suspended. Under the plea agreement, O'Mara retained the right to appeal the constitutionality of Virginia's cross burning statute.

Elliott was also charged with attempted cross burning and conspiracy to commit cross burning. Upon his plea of not guilty, a jury found him guilty of attempted cross burning, but not guilty of conspiracy. Elliott was sentenced to 90 days in jail and was fined $2500.

O'Mara and Elliott appealed to the Court of Appeals, alleging that the Virginia cross burning statute violated the free speech clauses of both the United States and Virginia Constitutions. The Court of Appeals affirmed the convictions, holding that the statute "targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence." *O'Mara v. Commonwealth*, 33 Va. App. 525, 536, 535 S.E.2d 175, 181 (2000).

In the third case reviewed, Barry Elton Black ("Black") organized and led a Ku Klux Klan rally on August 22, 1998, in Carroll County. Following speeches filled with racial, ethnic, and religious bigotry, a cross approximately 25 to 30 feet tall was ignited.

Black was indicted for violating Virginia's cross burning statute. He moved for dismissal of the indictment on the grounds that the statute was unconstitutional. The trial court denied Black's motion and, upon conviction by a jury, Black was sentenced to pay a fine of $2500.

Black appealed his conviction, and the Court of Appeals affirmed the judgment of the trial court, "[f]or the reasons stated in *O'Mara v. Commonwealth*." *Black v. Commonwealth*, Rec. No. 1581-99-3, December 19, 2000, at 1.

THE CROSS BURNING STATUTE

Code § 18.2-423, the cross burning statute, provides that:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Black[1] contends that the cross burning statute is unconstitutional because it engages in viewpoint and

[1] Because of the similar constitutional challenges presented in these consolidated cases, our references to Black's contentions shall be inclusive of those mounted by O'Mara and Elliott.

content discrimination and it fails to incorporate the standards articulated by the United States Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), concerning incitement to, and likelihood of, imminent lawless action. Additionally, Black contends that the provision of the statute permitting an inference of intent to intimidate from the mere act of burning a cross, which excuses the Commonwealth from its proof requirement for the establishment of a prima facie case, further aggravates viewpoint and content discrimination and violates the limitations prescribed in *Brandenburg*.

The geometric configuration of a single vertical bar traversed by a single shorter horizontal bar has no unusual inherent properties. But its symbolic meaning is powerful. For Christians, the symbol of the cross evokes remembrance of the crucifixion of Christ. Unfortunately, such powerful symbols are often subject to misappropriation. As recognized by Justice Clarence Thomas in his concurring opinion in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), the burning of a cross has acquired a specific meaning:

> There is little doubt that the Klan's main objective is to establish a racist white government in the United States. In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. The cross is associated with the Klan not because of religious worship, but because of the Klan's practice of cross burning . . . . The Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate.

In 1952, in direct response to Ku Klux Klan activities in Virginia,[2] including incidents of cross burning, the General Assembly enacted the predecessor statute to the law at issue in these cases.[3] The cross burning statute was amended on several occasions, including an amendment expanding the sites where cross burning may not take place, and the addition of the inference of intent to intimidate from the mere act of burning a cross for the purposes of establishing a prima facie case under the statute.[4]

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[2] *See Police Aid Requested by Teacher: Cross is Burned in Negro's Yard*, Richmond News Leader, Jan. 21, 1949, at 19; *Cross Fired Near Suffolk Stirs Probe: Burning Second in Past Week*, Richmond Times-Dispatch, Jan. 23, 1949, § 2, at 1; *Huge Cross is Burned on Hill Just South of Covington*, Richmond Times-Dispatch, Apr. 14, 1950, at 6; *Cross Burned at Manakin; Third in Area*, Richmond Times-Dispatch, Feb. 26, 1951, at 4; *Cross is Burned at Reedville Home*, Richmond News Leader, Apr. 14, 1951, at 1; *'State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments*, Richmond Times-Dispatch, Feb. 6, 1952, at 7; *Bill to Curb KKK Passed by the House*, Richmond Times-Dispatch, Mar. 8, 1952, at 5; *Name Rider Approved by House: Measure Now Goes to Battle*, Richmond News Leader, Feb. 23, 1952, at 1; *Governor Backs Curb on Ku Klux Activities*, Richmond Times-Dispatch, Feb. 10, 1952, § 2, at 1.

[3] Code § 18.1-365 stated in pertinent part:

> It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the Commonwealth of Virginia a burning or a flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

1952 Va. Acts ch. 483 § 2 at 777.

[4] *See* 1968 Va. Acts ch. 350 at 450; 1975 Va. Acts ch. 14 at 90, ch. 15 at 174.

SELECTIVE REGULATION OF SPEECH BASED UPON CONTENT

It is well established that non-verbal, symbolic expression is "speech," and is as fully protected by the First Amendment to the United States Constitution as more traditional means of communication. *See, e.g., Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (wearing of black arm bands by high school students as a protest against the war in Vietnam). However pernicious the expression may be, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Any question about the constitutional infirmity of such selective proscription of speech was resolved by the United States Supreme Court in the case of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

The Virginia cross burning statute is analytically indistinguishable from the ordinance found unconstitutional in *R.A.V. R.A.V.* involved the prosecution of a teenager who, with several other minors, allegedly assembled a crudely made cross and burned the cross inside the fenced yard of a black family. *Id.* at 379. The City of St. Paul prosecuted under its Bias-Motivated Crime Ordinance, which provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

St. Paul, Minn., Legis. Code § 292.02 (1990). The trial court held that the statute was unconstitutional, but the Minnesota Supreme Court reversed, construing the St. Paul ordinance as limited to conduct that amounts to "fighting words," namely, "conduct that itself inflicts injury or tends to incite immediate violence . . . . " *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn.1991). Accepting the limited construction placed upon the statute by the Minnesota Supreme Court, the United States Supreme Court held that, even if the expression reached by the ordinance was proscribable under the "fighting words" doctrine, the ordinance was "facially unconstitutional in that it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses." *R.A.V.*, 505 U.S. at 381.

Noting that "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed," the Court observed that "[c]ontent-based regulations are presumptively invalid." *Id.* at 382 (citations omitted). Exceptions to the rule include: obscenity (*e.g., Roth v. United States*, 354 U.S. 476 (1957)), defamation (*e.g., Beauharnais v. Illinois*, 343 U.S. 250 (1952)), and "fighting words" (*e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). But simply because particular categories of speech may be regulated does not mean that such regulation may selectively discriminate on the basis of content. As the Court in *R.A.V.* stated:

> And just as the power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the

> same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements.

R.A.V., 505 U.S. at 386.

The Commonwealth argues that the Virginia statute is neutral because "Code § 18.2-423 applies equally to anyone who burns a cross for the purpose of intimidating anyone." The Commonwealth further dwells upon the phrase in *R.A.V.* which states that "threats of violence are outside the First Amendment." 505 U.S. at 388. This quotation is incomplete and distorts the holding of *R.A.V.* While a statute of neutral application proscribing intimidation or threats may be permissible, a statute punishing intimidation or threats based only upon racial, religious, or some other selective content-focused category of otherwise protected speech violates the First Amendment. *Id.*

Emphasizing the point, the Court in *R.A.V.*, noted:

> Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

R.A.V., 505 U.S. at 384.

> We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses – so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.

Id. at 386.

> A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience* – i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.

Id. at 388.

> And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871 – since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.

Id.

R.A.V. makes it abundantly clear that, while certain areas of speech and expressive conduct may be subject to proscription, regulation within these areas must not discriminate based upon the content of the message.[5] In

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[5] It is important to note that *R.A.V.* did not interpret the First Amendment to forbid "underinclusiveness." To the contrary, the Court held that:

> In our view, the First Amendment imposes not an "underinclusiveness" limitation but a "content discrimination" limitation upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's

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this case, the Commonwealth seeks to proscribe expressive conduct that is intimidating in nature, but selectively chooses only cross burning because of its distinctive message. As the Court in *R.A.V.* succinctly stated: "the government may not regulate use based upon hostility – or favoritism – towards the underlying message expressed." *Id.* at 386.

While not specifically stating that "race, color, creed, religion or gender" is the subject of proscription, the absence of such language in the Virginia statute does not mask the motivating purpose behind the statutory prohibition of cross burning. The United States Supreme Court dealt with a similar question in the "flag burning" cases. In *Texas v. Johnson*, Johnson was prosecuted under a statute making it unlawful to intentionally or knowingly desecrate the United States flag. "Desecrate" was defined as "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." 491 U.S. at 400 (quoting Texas Penal Code Ann. § 42.09 (1989)).

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prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content.

Id. at 387. Of course, the subjects of the proscription expressly stated in the St. Paul ordinance were symbols and words, including a burning cross or a Nazi swastika, evoking "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." As the Court noted, excluded from proscription was identical behavior with a different subject, such as "political affiliation, union membership, or homosexuality." *Id.* at 391. The infirmity addressed in *R.A.V.*, as in the cases before this Court, was not "underinclusiveness;" rather, it was the selective discrimination in the ordinance based upon content.

After the Supreme Court declared the Texas statute unconstitutional, Congress enacted the Flag Protection Act of 1989. In subsequent litigation concerning the Act, the government maintained that the absence of language in the Act focusing upon the content of the actor's symbolic speech cured any constitutional problems. The Supreme Court disagreed in *United States v. Eichman*, 496 U.S. 310, 315 (1990) (internal quotations omitted), stating that, "[a]lthough the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is related to the suppression of free expression."

Similarly, considering the historical and current context of cross burning, and the statute's reliance on such context for the provision of an inference of intent to intimidate from the mere act of burning a cross, it is clear that the Commonwealth's interest in enacting the cross burning statute is related to the suppression of free expression as well.

The virulent symbolism of cross burning has been discussed in so many judicial opinions that its subject and content as symbolic speech has been universally acknowledged. For example, the Supreme Court of South Carolina declared a statute[6] with operative language similar to ours

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[6] S. C. CODE ANN. § 16-7-120 (1985) provided:

It shall be unlawful for any person to place or cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part or to place or cause to be placed on the property of another in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the

(Continued on following page)

unconstitutional and observed: "a burning cross historically conveys ideas capable of eliciting powerful responses from those engaging in the conduct and those receiving the message." *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993). The Court of Appeals of Maryland also declared a statute[7] with operative language similar to ours unconstitutional and observed:

> Those who openly burn crosses do so fully cognizant of the controversial racial and religious messages which such acts impart. Historically, the Ku Klux Klan burned crosses to express hostility towards blacks and other groups it disfavored, and it is that idea which contemporary cross burners aim to perpetuate.

State v. Sheldon, 629 A.2d 753, 757 (Md. 1993).

The historical context for the passage of the Virginia cross burning statute is uncontrovertible. In an atmosphere of racial, ethnic, and religious intolerance, the General Assembly acted to combat a particular form of intimidating symbolic speech – the burning of a cross. It did not proscribe the burning of a circle or a square because no animating message is contained in such an act.

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whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

1952 Va. Acts ch. 483 § 2 at 777.

[7] MD. ANN. CODE art.27, § 10A (1957, 1992 Repl. Vol.) provided in pertinent part:

It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place.

Initially, the cross burning proscription extended only to acts on property of another without permission. In 1968, the limitation concerning situs was removed, and in 1975, the addition of language establishing prima facie evidence of intent to intimidate from the mere act of burning a cross reaffirmed the legislative context of the statute. During oral argument, the Commonwealth maintained that the portion of the statute proscribing the burning of a cross had nothing to do with the motivation of the actor. When asked how the Commonwealth could justify the inference of intimidation provided in the last sentence of the statute, the Commonwealth relied upon the historical context of cross burning. The Commonwealth cannot have it both ways.

"SECONDARY EFFECTS"

As described above, the *R.A.V.* analysis begins with categories of speech that may be subject to regulation and holds that such regulation may not selectively discriminate on the basis of content. However, the Court in *R.A.V.* recognized that some selective regulation of constitutionally protected speech may be permissible if it is based upon the "secondary effects" of speech rather than its content. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the ordinance under review proscribed the location of an adult motion picture theater within 1,000 feet of any residential zone, single – or multiple – family dwelling, church, park, or school. Because the ordinance did not ban adult theaters entirely, the Court held that the ordinance is "properly analyzed as a form of time, place, and manner regulation." *Id.* at 46.

The analysis used by the Court focused upon whether the regulation was directed at the content of the protected speech or at a legitimate area of government concern. Determining that the dominant motive of the ordinance was "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,'" the Court upheld the ordinance. *Id.* at 48. The Court held that the regulation in *Renton* was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." *Id.* at 47. By contrast, the legislative history of the Virginia cross burning statute, the meaning afforded the expressive conduct, and the provision of prima facia evidence of intent to intimidate from the mere act of burning a cross, make it abundantly clear that Code § 18.2-423 is aimed at regulating content, not "secondary effects."

OVERBREADTH ANALYSIS

As discussed herein, the majority opinion in *R.A.V.* holds that certain categories of speech may be regulated, but the government may not discriminate in its proscription within these categories on the basis of content. The concurring opinions in *R.A.V.* preferred a more traditional analysis confined to the question whether the ordinance suffered from overbreadth. As Justice White noted, St. Paul's ordinance was unconstitutionally overbroad because:

> Although the ordinance as construed reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial

> amount of expression that – however repugnant – is shielded by the First Amendment.

Id. at 413 (J. White, concurring). The Commonwealth's cross burning statute is similarly defective.

It is not simply the prospect of conviction under the statute that renders it overbroad. The enhanced probability of prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988). Threat of prosecution under a criminal statute "tends to chill the exercise of First Amendment rights." *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). Self-censorship, "a harm that can be realized even without an active prosecution," inhibits free speech. *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 382 (2nd Cir. 2000).

Code § 18.2-423 provides in part that "any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Assuming that the act is done "on the property of another, a highway or other public place,"[8] the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief. That the trier of fact ultimately finds the actor not guilty of the offense is little consolation

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[8] The Virginia statute prohibits cross-burning "on the property of another, a highway or other public place." Remarkably, it sweeps within its prohibition the act "on the property of another" with or without permission.

after arrest and prosecution for speech or expressive conduct that is otherwise protected. Arrest for, and prosecution of, otherwise protected speech, with no evidence of a critical element of the offense other than a statutorily supplied inference, chills free expression. Code § 18.2-423 sweeps within its ambit for arrest and prosecution, both protected and unprotected speech. As such it is overbroad.

BRANDENBURG ISSUES

In *R.A.V.*, the Court acknowledged that the narrow construction placed upon the ordinance limited its application to "fighting words," a proper category of proscription. Nonetheless, the ordinance was declared unconstitutional because of its selective application to only certain expressions of fighting words. Virginia's cross burning statute suffers from the same infirmity. Because we hold that the statute impermissibly proscribes otherwise protected speech on the basis of content, and because the statute is overbroad, it is unnecessary to address the remaining challenges under *Brandenburg*.[9]

CONCLUSION

Under our system of government, people have the right to use symbols to communicate. They may patriotically wave the flag or burn it in protest; they may reverently worship the cross or burn it as an expression of

[9] Additionally, because we resolve these questions under the First Amendment to the United States Constitution, it is unnecessary to address Elliott's and O'Mara's additional argument that Article I, § 12 of the Virginia Constitution is also violated.

bigotry. Neutrally expressed statutes prohibiting vandalism, assault, and trespass may have vitality for the prosecution of particularly offensive conduct. While reasonable prohibitions upon time, place, and manner of speech, and statutes of neutral application may be enforced, government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed.

A statute selectively addressed to the content of symbolic speech is not permitted under the First Amendment. Additionally, a statute that sweeps within its ambit both protected and unprotected speech is overbroad. Accordingly, we hold that Code § 18.2-423 violates the First Amendment of the United States Constitution. The convictions in each of these appeals will be vacated and the indictments will be dismissed.

Reversed and dismissed.

JUSTICE KINSER, concurring.
JUSTICE HASSELL, with whom CHIEF JUSTICE CARRICO and JUSTICE KOONTZ join, dissenting.

JUSTICE KINSER, concurring.

In the words of the dissent, I, too, "stand second to none in my devotion to the First Amendment's mandate that most forms of speech are protected, irrespective of how repugnant and offensive the message uttered or conveyed may be to others." However, in contrast to the dissent, I cannot be dissuaded from that devotion, and believe that the "fair application of our jurisprudence" must include a fair and proper application of the First

Amendment. Therefore, I fully agree with the majority opinion. I write separately to address certain inferences and conclusions drawn by the dissent.

Relying on the definition of the term "intimidation" set forth in *Sutton v. Commonwealth*, 228 Va. 654, 663, 324 S.E.2d 665, 670 (1985) ("intimidation ... means putting a victim in fear of bodily harm"), the dissent concludes that Code § 18.2-423 proscribes only conduct that constitutes "true threats." Expanding on that definition, the dissent then states that the purpose of Code § 18.2-423 is "to proscribe physical acts intended to inflict bodily harm upon the victims of such acts." The dissent's attempt to equate an intent to intimidate with a "true threat" or a physical act intended to inflict bodily harm has no legal basis and misconstrues the decision in *Sutton*.

The issue in that case was whether there was sufficient evidence to prove that the defendant engaged in sexual intercourse with the victim against her will by intimidation. 228 Va. at 662, 324 S.E.2d at 669. Noting that the General Assembly had expanded the scope of the statute proscribing rape to include "a prohibition against sexual intercourse with a woman against her will by threat or intimidation," as well as by force, the Court explained that "[t]here is a difference between threat and intimidation[,]" and that "[i]ntimidation may occur without threats." *Id.* at 663, 324 S.E.2d at 669-70. Thus, our established jurisprudence does not support the proposition that Code § 18.2-423 proscribes only conduct that constitutes "true threats." An act performed with the intent to intimidate, i.e., to place an individual in fear of bodily harm, does not rise to the same level as a threat (defined in *Sutton* as "expression of an intention to do bodily

harm," 228 Va. at 663, 324 S.E.2d at 670), or a physical act intended to inflict bodily harm.

For the same reason, Code § 18.2-423 does not satisfy the principle enunciated in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Although reprehensible and offensive, the act of burning a cross with the intent to intimidate is not necessarily speech aimed at "producing imminent lawless action." *Id.* That proposition is borne out by the fact that the cross burning for which Barry Elton Black was convicted occurred on private property with the permission of the owner.

Even if the dissent were correct that Code § 18.2-423 proscribes only conduct that constitutes "true threats," the General Assembly cannot engage in content discrimination by selectively prohibiting only those "true threats" that convey a particular message. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). Unfortunately, that is what the General Assembly has done in Code § 18.2-423 by confining the proscription in that statute to the act of burning a cross. The constitutional infirmity is not, as suggested by the dissent, cured by the fact that the statute does not prohibit all acts of burning a cross. The statute's content-based discrimination still exists.

Finally, the dissent's statement that the majority has concluded that the Constitution of the United States prevents the General Assembly from enacting a statute that prohibits persons from burning a cross "in a manner

that intentionally places citizens in fear of bodily harm" misinterprets the holding in the majority opinion. I believe that a more accurate characterization of the majority's conclusion is that the General Assembly may, in a statute of neutral application, proscribe expressive conduct performed with the intent to intimidate another individual, but that the General Assembly may not selectively prohibit only certain acts of intimidation based upon the content of the underlying message.

For these reasons, I respectfully concur.

JUSTICE HASSELL, with whom CHIEF JUSTICE CARRICO and JUSTICE KOONTZ join, dissenting.

I dissent. The majority opinion invalidates a statute that for almost 50 years has protected our citizens from being placed in fear of bodily harm by the burning of a cross. The majority concludes that the Constitution of the United States prohibits the General Assembly from enacting this statute. I find no such prohibition in either the Constitution of Virginia or the Constitution of the United States. Without question, the framers of the First Amendment never contemplated that a court would construe that Amendment so that it would permit a person to burn a cross in a manner that intentionally places citizens in fear of bodily harm.

I am concerned about the fair application of our jurisprudence to every citizen and the proper interpretation of our Federal and State Constitutions. These same concerns for fairness and the safety of our citizens were

the very basis for the General Assembly's decision to enact Code § 18.2-423 almost 50 years ago.

I stand second to none in my devotion to the First Amendment's mandate that most forms of speech are protected, irrespective of how repugnant and offensive the message uttered or conveyed may be to others. However, contrary to the view adopted by the majority in these appeals, the First Amendment does not permit a person to burn a cross in a manner that intentionally places another person in fear of bodily harm.

I.

A.

Barry Elton Black was indicted by a Carroll County grand jury for the burning of a cross with the intent to intimidate in violation of Code § 18.2-423. At the conclusion of a trial, the jury found him guilty as charged in the indictment and fixed his punishment at $2,500. Black appealed the circuit court's judgment confirming the jury's verdict to the Court of Appeals, which affirmed his conviction. *Black v. Commonwealth*, Record No. 1581-99-3 (December 19, 2000).

The following evidence was presented during Black's trial. On August 22, 1998, H. Warren Manning, the Sheriff of Carroll County, received a report that members of the Ku Klux Klan intended to conduct a rally in Carroll County that evening. Later, Sheriff Manning drove his police car to the site of the rally, where three men dressed in white robes and hats approached him. Sergeant Richard C. Clark, Jr., met Sheriff Manning at the site of the rally.

Approximately 45 minutes later, after the rally started, Sheriff Manning observed the Klan members burn a cross that was approximately 25 to 30 feet tall. Sheriff Manning approached Black and inquired, "who [is] responsible for burning the cross?" Black responded that he was responsible for burning the cross, and he was placed under arrest.

The rally was conducted on property owned by Annabell Sechrist. She was present during the rally, and she had given the Ku Klux Klan permission to burn the cross on her property.

Rebecca Sechrist, a Caucasian female, lived on property adjacent to the property where the rally occurred. Sechrist observed the rally from her home. In response to the question, "[w]hat statements did you hear?", she testified: "They . . . talked a lot about blacks – and I don't call [ ] the word they called it . . . it started with an N and I don't, I don't use that word, I'm sorry – but they talked real bad about the blacks and the Mexicans and they talked about how, one . . . guy got up and said that he would love to take a .30/.30 and just random shoot the blacks and talked about how they would like to send the blacks and the Mexicans back from where they come from and talked about President Clinton and Hillary Clinton and about the government funding money for the, for the people that can't afford housing and stuff and . . . how their tax paying goes to keep the black people up and stuff like that."

Sechrist testified that she was "scared" as a result of the rally. She stated: "I was scared our home would get burned or something would happen to it. We've got two . . . kids and I was afraid that something would happen to

them." In response to a question by defendant's counsel, Sechrist testified: "I think they were trying to scare me."

B.

Jonathan Stephen O'Mara was indicted by a grand jury in the City of Virginia Beach for attempting to burn a cross with the intent of intimidating a person or group of persons in violation of Code § 18.2-423 and conspiracy to burn a cross in violation of Code § 18.2-423. O'Mara entered a guilty plea that reserved his right to file an appeal challenging the constitutionality of Code § 18.2-423.

The court fixed O'Mara's punishment at incarceration in the jail for a term of 90 days and imposed a fine of $2,500 on each of the charges. O'Mara appealed the judgment to the Court of Appeals, which affirmed his convictions. *O'Mara v. Commonwealth*, 33 Va. App. 525, 535 S.E.2d 175 (2000).

O'Mara entered into a stipulation of facts with the Commonwealth, which was made a part of the record in the circuit court. The stipulation states: "On May 2, 1998, David Targee had approximately fifteen individuals, including Jonathan O'Mara and Richard Elliott, at his residence in Virginia Beach. They were all consuming alcohol. Elliott complained to Targee and O'Mara about his neighbor and about how he wanted to 'get back' at him. It was suggested (not by O'Mara) that they burn a cross in Elliott's neighbor's yard. O'Mara and Targee agreed, and they all went to Targee's garage where a cross was built. They all got in Targee's truck and drove to Munden Point Road in Virginia Beach. Targee was driving, with O'Mara in the front passenger seat and Elliott in the back seat.

Once there, Elliott handed the cross to O'Mara, who also grabbed a can of lighter fluid and went outside and placed the cross in the yard of Elliott's neighbor. He then poured lighter fluid on the cross, set it on fire, and ran back to the car. Targee drove them back to his house. The next morning, Elliott's neighbor, James Jubilee, came out of his house and observed the partially burned cross in his yard. He broke the cross and placed [it] in the garage. He later called the police."

C.

A grand jury in the City of Virginia Beach indicted Richard J. Elliott for attempting to burn a cross on the property of James S. Jubilee with the intent of intimidating any person or group of persons in violation of Code § 18.2-423 and conspiracy to burn a cross in violation of Code § 18.2-423. At the conclusion of a trial, the jury found Elliott guilty of attempted cross burning with the intent to intimidate and fixed his punishment at 90 days incarceration in jail and a fine of $2,500. Elliott appealed the circuit court's judgment to the Court of Appeals, which affirmed his conviction. *See O'Mara*, 33 Va. App. 525, 535 S.E.2d 175.

The following evidence was adduced at the trial. James Jubilee resided at 2044 Munden Point Road in Virginia Beach. One day, Mr. Jubilee told his next door neighbor, Mrs. Elliott, that he was concerned because persons were discharging firearms in her backyard. Mrs. Elliott responded that her husband maintained a firing range in the rear of her yard.

On May 2, 1998, David Targee had a party at his home where he entertained Jonathan O'Mara, Richard

Elliott, and others. Richard Elliott, who had consumed alcoholic beverages, mentioned that "his neighbors were complaining about him shooting in his backyard. . . . He wanted to get back at them for doing it."

Later that evening, Targee, Elliott, and O'Mara went to Targee's parents' garage and constructed a wooden cross. After they had constructed the cross, they traveled by car to Mr. Jubilee's home where O'Mara placed the cross in the yard and ignited it. The next morning between 8:15 and 8:30, Mr. Jubilee saw the cross, which contained "burn spots." He picked it up and broke it.

Jennifer Luning, O'Mara's former "girlfriend," testified that O'Mara admitted that he, Targee, and Richard Elliott had burned the cross. "He had said that before they actually went out and did it that there was a conversation taking place about Richard had been complaining or the neighbors had been complaining about shooting [guns] in the backyard."

Edwin Coyner, a fire investigator for the City of Virginia Beach, testified that he interviewed Targee several times. Targee informed Coyner that "Richard Elliott had complained about his neighbors because the neighbors had complained about him shooting in the backyard."

II.

A.

The First Amendment of the Constitution of the United States provides in part: "Congress shall make no law . . . abridging the freedom of speech." Article I, § 12 of the Constitution of Virginia states:

> "That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances."

The Fourteenth Amendment prohibits state action in violation of the First Amendment. The freedom of speech guaranteed by Article I, § 12 of the Constitution of Virginia is co-extensive with the protections guaranteed by the First Amendment of the Constitution of the United States.

Code § 18.2-423 states:

> "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

B.

We have held, since the birth of this Commonwealth, that "the judiciary may and ought to adjudge a law unconstitutional and void, if it be plainly repugnant to the letter

of the Constitution, or the fundamental principles thereof." *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 40 (1793). However, clearly engrained within our jurisprudence is the principle that this Court

> "can declare an act of the general assembly void *only* when such act *clearly and plainly* violates the [C]onstitution, and in such manner as to leave no doubt or hesitation on our minds.
>
> "This rule has been repeatedly declared by this court.
>
> . . . .
>
> The presumption always is that the legislature has judged correctly of its constitutional powers, and the contrary must be clearly demonstrated before a co-ordinate branch of the government can be called upon to interfere between the people and their immediate representatives."

Commonwealth v. Moore, 66 Va. (25 Gratt.) 951, 953 (1875). Indeed, we have repeatedly held that "[e]very act of the legislature is presumed to be constitutional, and the courts are powerless to declare an act invalid, except where it appears beyond doubt that it contravenes some provision of the State or Federal Constitution. If we doubt we must sustain its constitutionality." *Tobacco Growers' Co-Operative Assoc. v. Danville Warehouse Co.*, 144 Va. 456, 469, 132 S.E. 482, 486 (1926). We restated this fundamental principle in *Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959):

> "When the constitutionality of an act is challenged, a heavy burden of proof is thrust upon the party making the challenge. All laws are presumed to be constitutional and this presumption

> is one of the strongest known to the law. As we said in *Almond v. Day*, 199 Va. 1, 6, 97 S.E.2d 824[, 828 (1957)]: ' . . . It is only where an act is plainly repugnant to some constitutional provision that the courts can declare it null and void. If there be a reasonable doubt whether the act violates the fundamental law, that doubt must be resolved in favor of the act.'"

Accord Jefferson Green Unit Owners Asso , Inc. v. Gwinn, 262 Va. 449, 459, 551 S.E.2d 339, 344 (2001); *Motley v. Virginia State Bar*, 260 Va. 243, 247, 536 S.E.2d 97, 99 (2000); *Finn v. Virginia Retirement System*, 259 Va. 144, 153, 524 S.E.2d 125, 130 (2000); *Pulliam v. Coastal Emergency Services*, 257 Va. 1, 9, 509 S.E.2d 307, 311 (1999); *Mumpower v. Housing Authority*, 176 Va. 426, 443, 11 S.E.2d 732, 738 (1940); *Antoni v. Wright*, 63 Va. (22 Gratt.) 833, 882 (1872); *Auditor of Public Accounts v. Graham*, 5 Va. (1 Call) 475, 476 (1798). For some inexplicable reason, the majority ignores this fundamental principle.

C.

Black, O'Mara, and Elliott (the defendants), relying principally upon *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), argue that Code § 18.2-423 violates their right to freedom of speech guaranteed by the First Amendment to the Constitution of the United States and Article I, § 12 of the Constitution of Virginia and that the Court of Appeals erred by holding that the statute comported with these constitutional provisions. I disagree with the defendants.

Initially, I observe that Code § 18.2-423, by its express terms, does not proscribe every act of burning a cross. Rather, Code § 18.2-423 only proscribes the act of burning a cross when such act is performed "with the intent of

intimidating any person or group of persons" and the act is committed "on the property of another, a highway or other public place." In the context of our criminal statutes, specifically Code § 18.2-61, we have defined intimidation as acts which put the victim "in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria." *Sutton v. Commonwealth*, 228 Va. 654, 663, 324 S.E.2d 665, 669 (1985).

Thus, applying the clear and unambiguous language in Code § 18.2-423 in conjunction with our established definition of intimidation, which the majority ignores, I conclude that Code § 18.2-423 only proscribes conduct which constitutes "true threats." And, I note that the United States Supreme Court, in *Watts v. United States*, 394 U.S. 705, 707 (1969), approved the facial constitutionality of a federal criminal statute that prohibited someone from threatening the life of the President of the United States. It is well established that true threats of violence can be proscribed by statute without infringing upon the First Amendment. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774 (1994); *Nat'l Organization for Women, Inc. v. Scheidler*, ___ F.3d ___, ___ (7th Cir. 2001); *Bauer v. Sampson*, 261 F.3d 775, 782 (9th Cir. 2001); *United States v. Rahman*, 189 F.3d 88, 115 (2nd Cir.), *cert. denied*, sub nom. *Nosair v. United States*, 528 U.S. 982 (1999); *United States v. Francis*, 164 F.3d 120, 122-23 (2nd Cir. 1999); *United States v. J.H.H.*, 22 F.3d 821, 825 (8th Cir. 1994). However, I must continue this inquiry regarding the constitutionality of Code § 18.2-423 because in *R.A.V., supra*, the Supreme Court held that the First Amendment

imposes certain limitations upon the regulation of speech and expressive conduct, including true threats.

In *R.A.V.*, the Supreme Court considered whether an ordinance was facially invalid under the First Amendment. In *R.A.V.*, the defendant, along with several other teenagers, made a wooden cross and burned it in a yard owned by a black family. The defendant was convicted of violating the following ordinance:

> "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

The Supreme Court held that the ordinance was facially unconstitutional because it prohibited otherwise permitted speech solely on the basis of the content of the speech, even though the Minnesota Supreme Court had concluded that the ordinance only prohibited unprotected "fighting words." *R.A.V.*, 505 U.S. at 379-81.

The Supreme Court observed, however, that certain "areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) – not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination

of proscribing *only* libel critical of the government." *Id.* at 383-84.

The Supreme Court explained:

> "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: a State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience – i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. See *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991). And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871 – since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. See *Watts v. United States*, 394 U.S. 705, 707 (1969). . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example . . . a State may choose to regulate price advertising in one industry, but not in others, because the risk of fraud . . . is in its view greater there. . . . But a State

> may not prohibit only that commercial advertising that depicts men in a demeaning fashion."

R.A.V., 505 U.S. at 388-89.

The Supreme Court also articulated a second basis which would permit some degree of content-based discrimination.

> "Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.' *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). . . . A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech, but against conduct . . . a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct, rather than speech. . . . Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.
>
> "These bases for distinction refute the proposition that the selectivity of the restriction is 'even arguably "conditioned upon the sovereign's agreement with what a speaker may intend to say."' *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 555 (1981). . . . There may be other such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue), it may not even be necessary to identify any particular

> 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. . . . Save for that limitation, the regulation of 'fighting words,' like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone."

R.A.V., 505 U.S. at 389-90.

In invalidating the City of St. Paul's ordinance, the Supreme Court stated that

> "[a]lthough the phrase in the ordinance 'arouses anger, alarm or resentment in others,' has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to 'fighting words,' the remaining, unmodified terms make clear that the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."

Id. at 391.

Continuing, the Supreme Court explained:

> "What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . messages of 'bias-motivated' hatred and, in particular, as applied to this case, messages 'based on virulent notions of racial supremacy.'"

Id. at 392 (citation omitted).

Contrary to the majority's opinion, Code § 18.2-423 does not suffer from the defects contained in the ordinance at issue in *R.A.V.* As previously stated, Code § 18.2-423 does not prohibit every act of burning of a cross. Rather, the statute only prohibits the burning of a cross when such act is performed with the intent to intimidate. And, consistent with our jurisprudence, the word "intimidate" means to place one in fear of bodily harm. Unlike the City of St. Paul's ordinance, which targeted cross burning on the basis of race, color, creed, religion or gender, Code § 18.2-423 does not contain those limitations. The conduct proscribed in the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate. That point is best illustrated in *O'Mara* and *Elliott* because these defendants burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliotts' yard, not because of any racial animus.

Additionally, the Supreme Court pointed out in *R.A.V.* that a valid basis for according differential treatment even to a content-defined subclass of proscribable speech is

when the subclass happens to be associated with particular secondary effects of the speech so that the regulation is justified without reference to the content of the speech. The ordinance that the Supreme Court invalidated in *R.A.V.* targeted any cross burning that "one knows or has reasonable grounds to know arouses anger, alarm or resentment." 505 U.S. at 380.

By contrast, from its clear and unambiguous language, the purpose of the Virginia statute, Code § 18.2-423, is not to suppress repugnant ideas, but rather to proscribe physical acts intended to inflict bodily harm upon the victims of such acts. Simply stated, the Virginia statute proscribes acts of intimidation, but it does not prohibit persons from expressing their views, irrespective of how repugnant or offensive those views may be to others. The Virginia statute does not prohibit the burning of a cross so long as that act is committed without an intent to place a person in fear of bodily harm. *See also In re Steven S.*, 31 Cal. Rptr. 2d 644, 646, 647-48 (Cal. Ct. App. 1994) (statute proscribing the act of "burn[ing] a cross on the private property of another for the purpose of terrorizing the owner or occupant or in reckless disregard of that risk" is not impermissible content-based prohibition on speech within the meaning of the First Amendment); *State v. Talley*, 858 P.2d 217, 220, 225-27 (Wash. 1993) (statute proscribing cross burning that places another person in reasonable fear of harm to his person or property does not violate the First Amendment).

I recognize that the Supreme Court of South Carolina, in *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993), invalidated a statute that prohibited the burning of a cross on the basis that it contravened the First Amendment. The South Carolina statute, however, was significantly different from

the Virginia statute. The South Carolina statute stated: "It shall be unlawful for any person to place or cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part . . . without first obtaining written permission of the owner or occupier of the premises so to do." *Id.* at 514.

Unlike Code § 18.2-423, which proscribes the burning of a cross with the intent of intimidating and, thus, prohibits real threats, the South Carolina statute contained no similar limitation. The Supreme Court of South Carolina concluded that its statute was enacted "in order to protect individuals and society as a whole from the reprehensible messages often sought to be symbolicly [sic] expressed by a burning cross." *Ramsey*, 430 S.E.2d at 514. As I have already explained, Virginia's statute does not suffer from this constitutional defect. Thus, the differences between the Virginia statute and the South Carolina statute are real and significant. Yet, the majority ignores the differences between Code § 18.2-423 and the South Carolina statute.

I also observe that the Maryland Court of Appeals, in *State v. Sheldon*, 629 A.2d 753, 755 (Md. 1993), held that a Maryland statute violated the First Amendment because it required those who wished to burn crosses or religious symbols to "secure the permission of the property owner where the burning is to occur and [to] notify the local fire department before engaging in the burning." That statute stated in part:

> "It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place."

Id. at 755. Unlike the Virginia statute, the Maryland statute did not proscribe burning a cross with the intent of intimidating, but rather, is content-based regulation of expression. The Maryland Supreme Court found "no way to justify the cross burning statute without referring to the substance of speech it regulates, because the statute does not protect property owners or the community from unwanted fires any more than the law already protected those groups before the statute's enactment." *Id.* at 755. Yet, the majority ignores these significant distinctions.

III.

Defendant Black argues that Code § 18.2-423 "does not incorporate the requirements that the speech at issue be directed to the incitement of imminent lawless action, and likely to produce such action, and as such is unconstitutional under the standard of *Brandenburg v. Ohio*, and the *Brandenburg* standard was not satisfied here." I disagree with the defendant. The Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) simply has no application here.

The Supreme Court considered the following facts in *Brandenburg*. Brandenburg, "a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for 'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any

society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'" *Id.* at 444-45 (alteration in original).

Brandenburg placed a telephone call to a reporter on the staff of a television station and invited the reporter to attend a Ku Klux Klan rally that would be held at a certain farm. "[T]he reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network." *Id.* at 445. The prosecutor relied upon the films and testimony identifying the defendant as the person who communicated with the reporter and who spoke at the rally. The prosecutor "also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films." The only persons present at the rally other than the participants were the newsmen who made the film. *Id.* at 445-46.

The Supreme Court pointed out that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Continuing, the U.S. Supreme Court stated that

> "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech

> which our Constitution has immunized from governmental control."

Id. at 448.

The Supreme Court invalidated the Ohio Criminal Syndicalism Act because neither the indictment nor the trial court's instructions to the jury "refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Id.* at 448-49.

In stark contrast to the Supreme Court's decision in *Brandenburg*, we are not concerned here with abstract teaching regarding the moral propriety or even moral necessity of violence as a means for accomplishing political reform. Rather, the subject of this case is Code § 18.2-423, a statute which proscribes the burning of a cross with the intent to intimidate, which we have held means to place the victim in fear of bodily harm. And, I note that the jury at defendant Black's trial was specifically instructed that

> "[i]ntimidate, as used in the term 'with the intent to intimidate' means a motivation to intentionally put a person or group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria."

I have already observed, in response to defendant's counsel's questions at trial, Rebecca Sechrist testified that she was afraid that her "home would get burned or something would happen to it." Moreover, defendant Black has never challenged the sufficiency of the evidence to support

the jury's finding beyond a reasonable doubt that his acts placed Sechrist in fear of bodily harm.

IV.

Defendant Black argues that "[t]he provision of Code § 18.2-423 providing that the burning of a cross shall be *prima facie* evidence of an intent to intimidate permits a jury to find intimidation from the mere act of cross-burning alone, in contravention of the First Amendment." I disagree.

Code § 18.2-423 creates a statutory inference, and we have stated that an "inference merely applies to the rational potency or probative value of an evidentiary fact to which the fact finder may attach whatever force or weight it deems best." *Martin v. Phillips*, 235 Va. 523, 526 n.1, 369 S.E.2d 397, 399 n.1 (1988). Additionally, "inferences are never allowed to stand against ascertained and established facts." *Ragland v. Rutledge*, 234 Va. 216, 219, 361 S.E.2d 133, 135 (1987) (citing *Southern Ry. v. Mays*, 192 Va. 68, 76, 63 S.E.2d 720, 725, *cert. denied*, 342 U.S. 836 (1951)).

This statutory inference is a factor that the jury may accept or reject in determining whether a defendant burned a cross with the intent to intimidate a victim. This inference alone, however, is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate. And, this statutory inference does not, and cannot, absolve the Commonwealth of its burden to prove each element of Code § 18.2-423 beyond a reasonable doubt.

Moreover, the jury in Black's trial was specifically instructed as follows:

"INSTRUCTION NO. 6

"THE COURT INSTRUCTS THE JURY THAT:

> "The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged. It is not sufficient that the jury believe the defendant's guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction. The evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go outside the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and the defense and unless you believe that the guilt of Barry Elton Black has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find him not guilty."

. . . .

"INSTRUCTION NO. 8

"THE COURT INSTRUCTS THE JURY THAT:

> "The defendant is charged with the crime of placing a burning cross in a public place with the intent to intimidate. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

"(1) That the defendant burned or caused to be burned a cross in a public place; and

"(2) That he did so with the intent to intimidate any person or group of persons.

"If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

"If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the defendant not guilty."

As these jury instructions indicate, the Commonwealth was required to prove each and every element of its case, including the requirement of intimidation, beyond a reasonable doubt.

V.

For the foregoing reasons, I would affirm the judgments of the Court of Appeals.

Richmond News Leader, Jan. 21, 1949, at 19

Police Aid Requested By Teacher

Cross is Burned In Negro's Yard

A Negro school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police today after the burning of a cross in his front yard last night.

At Second District, officer said patrolmen on the beat in which the residence is situated have been instructed to pay special attention to activities in that block, particularly during the day when both the complainant and his wife are in school.

The incident happened at about 8:30 o'clock last night in the yard of 2700 Barton Ave., now owned by J. M. Sweat, a teacher at George Mason School.

TOLD BY NEIGHBOR

Sweat said he and his wife were in the upstairs rooms listening to the radio and knew nothing of what was happening until a neighbor rang their doorbell and told them.

The burning cross, about five feet high, was covered with burlap bags soaked in oil. Witnesses said it had burned about 10 minutes before Sweat extinguished the flames by pouring water on them.

The householder, aided by police, removed the cross to the rear yard.

A small crowd had gathered and was watching the burning when Sweat emerged from the house and disposed of the flaming cross.

The Sweat family had moved into the house several weeks ago, but said this was the first trouble they have had. While all the other homes in the 2700 block now are occupied by whites, several of them have been purchased by Negroes, who expect to occupy them soon.

Mrs. Sweat, a student at Virginia Union University, said today she did not "have the slightest idea" who could have been responsible for the act, and added that she was somewhat puzzled by its significance.

"I knew such things happened during the last century," she said, "but I didn't know there were any Ku Klux Klanners in Richmond now. It looks like a KKK act."

Richmond Times-Dispatch, Jan. 23, 1949, § 2, at 1

Cross Fired Near Suffolk Stirs Probe

Burning Second in Past Week

Virginia's second cross-burning episode of the week was under investigation yesterday by Nansemond County law enforcement officers.

A six-foot wooden cross was burned Friday night in front of a store at Driver, owned by Alvester Drake, a Negro.

The incident followed by less than 24 hours, the burning of a cross on the front lawn of J. M. Sweat, a Negro schoolteacher living in a predominantly white residential section of Richmond.

J. Frank Culpepper, Nansemond County sheriff said "only a few persons" apparently set up and lit the cross near Drake's store. He said none of the participants were hooded or masked, and that there was no ceremony.

Culpepper said the cross-burners arrived at the store in two automobiles and left immediately after setting the flames.

Two Different Groups

He could ascribe no reason for the incident. But he said he believed the participants were not the same group which last December 11 burned a cross on the property of County Fire Warden N. H. Bradshaw. All of the members of that group, he pointed out, were hooded and masked, and there was a ceremony attendant upon the burning.

Meantime, Richmond police continued an investigation into the burning of a five-foot cross in the Sweat front yard. Police Chief O. D. Garton said Saturday his department was sparing no effort "to apprehend the guilty parties."

If found, he said the participants could be charged with violating city fire ordinances, trespassing and disturbing the peace.

Sweat was not at home when the cross-burning occurred in the North Side community of Barton Heights. Police extinguished the fire after the cross had been burning about 10 minutes.

Sweat said he "had no idea who was responsible."

The cross burnings at Driver and Richmond brought to eight the number which have occurred in Virginia

during the past year. Six of the incidents have occurred in Nansemond County.

Four crosses were burned near Suffolk last Spring, and about 150 persons took part in the December 11 cross burning near Whaleyville. No arrests have been made in connection with any of the incidents.

Some sources have expressed the opinion that the cross burnings, especially the Whaleyville affair, were Ku Klux Klan activities.

But in Atlanta, KKK Grand Dragon Samuel Green said yesterday that the Klan "played no part" in the incidents and had no member groups in Virginia.

"Un-American Act"

The latest Richmond cross burning was denounced last night by W.H. Reavis, treasurer of the Progressive party of Richmond, as "an un-American act, designed to intimidate Negroes from seeking their rights as citizens."

"The Klan elements who participated in and inspired this terroristic act fear the growing movement of the Negro people for their full constitutional rights and for an end to the un-American practices of discrimination and segregation," Reavis' statement said.

It added that "the Klan and Klan-minded groups are frightened at the increased political activity of the Negroes in Richmond, together with labor and other white progressives."

The first Richmond cross burning occurred on March 23 of last year on the lawn of the Robert Fulton School.

Onlookers in the vicinity reported seeing persons clad in sheets running back and forth behind the burning cross during the 20 minutes that it was afire early that night.

Police said school property was not damaged, and they could give no reason for the affair.

No one was on the school property when the officers arrived. Police later said they thought the cross burning was a prank.

Meanwhile, Alice Burke, State chairman of the Virginia Communist party, issued this statement here last night:

"Our city was immeasurably harmed when a cross was burned on the lawn of one of Richmond's citizens." (She referred to the most recent incident).

Richmond Times-Dispatch, Apr. 14, 1950, at 6.

Huge Cross Is Burned on Hill Just South of Covington

Special to the Times-Dispatch

COVINGTON, VA., April 13 – a huge cross reminiscent of the Ku Klux Klan days, was burned atop a hill just south of Covington late last night.

Hugh D. Little of Suffolk one of nine men questioned by Sheriff W. E. Henderson, assumed responsibility for the burning the sheriff said, and explained that the cross was a part of an initiation ceremony of the Knights of the Kavaliers, a secret organization charted by the State Corporation Commission in 1948.

Sheriff Henderson said Little exhibited the charter of the organization, showing himself, John R. Hampton, of Suffolk; Ralph E. Hampton of Suffolk; and James T. Lewis, of Norfolk, as the organizers.

There was no show of violence in connection with the cross-burning. Sheriff Henderson said. He added that Little gave him a signed statement in which he admitted full responsibility for the act.

Henderson said he investigated the incident on the strength of an anonymous telephone call and intercepted nine men in four cars about 500 yards from the burned cross. Little and John R. Hampton were in the first of the four cars, he said, and readily admitted their identities.

The men in the other three cars, Henderson said, were believed to be local citizens but he was unable to identify them. They would not discuss the matter, leaving Little to do the talking, he added.

After questioning the men on the road, Henderson said he went to the scene and found the charred cross lying on the ground partially covered with dirt but still burning. He extinguished the flames and took the cross to his office.

The sheriff said the cross was constructed of sawed lumber two by five inches. The cross-bar, he said, was about six feet long and the upright bar about 12 feet long.

A similar cross-burning took place near Covington July 2 of last year, but the scene of that incident was on the opposite side of town from the burning last night.

Investigation Planned

SUFFOLK, April 13, – The Nansemond Commonwealth's Attorney Paul L. Everett said today his office plans to investigate a cross burning at Driver last night to see if there had been any violation of the law. Deputy Sheriff, C. F. Mansey described the cross as 18 feet high and eight feet wide.

Richmond Times – Dispatch, Feb. 26, 1951, at 4

Cross Burned At Manakin; Third in Area

Men Flee Negro Home In Auto, Firing Pistol

MANAKIN, VA. Feb. 25 – A six-foot cross was burned in front of the home of a Negro family in the center of this small Goochland community shortly before 10 o'clock Saturday night.

It was the third such cross to be burned in this vicinity within the past week, authorities said. Two of the crosses were burned in Goochland County and the third in the western section of Henrico County.

In all three cases, the crosses were burned in front of the homes of Negro tavern owners. Law enforcement authorities were unable to give any reason for the burnings.

The latest cross was burned in front of the home of John B. Pittman, owner of a small tavern on State Route 6, about 11 miles west of Richmond and 10 miles east of Goochland Courthouse.

Five Shots Fired

Pittman said he heard a commotion in front of his home Saturday night. When he went to the front door, the cross was blazing. He said five or six white men were running away. They jumped into an automobile parked near by and drove away in the direction of Goochland Courthouse, he said.

Pittman said one of the men stuck a pistol out of a window of the automobile and fired five times.

"I can think of no reason why tehy [sic] picked out me to burn a cross," Pittman said. "I have run a business in the county for years and have no enemies as far as I know."

Deputy Sheriff John Amos said a similar cross was burned Saturday, February 17, in front of Ida Mickie's home on Maidens Road, several miles from the Pittman residence.

There had been a fight at the Mickie Tavern the night before and several persons had been arrested, Amos said. "We thought it was some of those arrested trying to get revenge on the woman but with the burning last night it puts a different light on the matter," he said.

Pranksters Suspected

Amos said no one saw the cross being placed at the Mickie place. Several shots were fired as the automobile drove away.

The crosses were about six feet high and made out of small strips of wood like bean holders; Amos said. The

crosses were wrapped in burlap bagging, which had been soaked in oil.

Goochland County Sheriff Joe Powers said last night he and Amos were working on the two cases. He said it was his opinion that the crosses were the work of "bad boys" in the county and they were "acts of vandalism."

Commonwealth's Attorney J. C. Knibb was out of the county for the weekend.

White persons living in the vicinity were questioned by a reporter, but none could give any information as to why the crosses had been burned.

In the Henrico County case, the cross was burned in front of the Broadway Inn, a Negro tavern on Broad Street Road about five miles west of Richmond, also on Saturday night, February 17.

Henrico County Policeman R. H. Beck, who investigated the complaint said he thought it was the work of pranksters. He listed "vandalism" on his report.

Henrico County Police Chief Wilmer Hedrick said last night he had thought the cross burned in his county was an act of vandalism. However, he said in view of the other two burnings, he planned to confer with Goochland authorities for further investigation.

Commonwealth's Attorney H. M. Ratcliffe said last night he had not heard of the burning but that he would take action if the persons responsible were caught.

Richmond News Leader, Apr. 14, 1951, at 1

Cross Is Burned At Reedville Home

Special to The News Leader

REEDVILLE, April 14 – A cross was burned here last night in front of the home of R. L. Walker, local fish net repairman.

The family said today they suspected the cross burning was the result of the family's prosecution of five juveniles recently. The youths were punished Thursday in Juvenile Court for shooting firecrackers at the Walker's home, Walker's daughter said.

Investigation of the cross-burning is being conducted by the Northumberland County sheriff.

Richmond Times-Dispatch, Feb. 6, 1952, at 7

'State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments

Governor Battle said yesterday that Virginia "might well consider passing legislation" to restrict the activities of the Ku Klux Klan.

He took his cue from the reports that the Klan, long considered dead in Virginia, is being revitalized in Richmond. A prominent Southern Ku-Kluxer has confirmed a report that attempts are being made to establish a klavern in Richmond.

[In the hooded organization, a klavern is the name given to local Ku Klux Klan clubs.]

Asked for a comment on the report that the Klan is to be revived in Virginia, the Governor said: "My reaction is not very happy."

He said that he did not know of any Virginia statutes which prohibit the wearing of masks in public and added, "If the Klan, as presently constituted, is coming to Virginia, we might very well consider passing such legislation."

By "such legislation" the Governor meant a law similar to those passed by other States where the Klan has been reactivated.

Meanwhile, Dr. J. M. Tinsley, local president of the National Association for the Advancement of Colored People, said he would call on the Federal Bureau of Investigation today to take immediate action.

Yesterday, FBI officials here said they had no word from Dr. Tinsley or other NAACP officials and declined to comment on the Klan.

"There is nothing more important than the FBI should devote its activities to at this time in Virginia than to apprehend and expose the people who are organizing and joining the Ku Klux Klan," Dr. Tinsley said.

Bill Hendrix, of Tallahassee, Fla., grand dragon of one division of the Klan, confirmed a report Monday that he was in Richmond "a couple of weeks ago" and plans a return visit "the first Saturday in March." He refused to identify his Richmond contacts and where the meeting will be held when he makes a return visit.

Foster on Guard

Richmond's safety director, Richard R. Foster, said he had heard nothing on the reactivation of the Klan, but "will keep a close watch on it." He added that he would have to wait for further developments.

In Leesville, S. C., Thomas L. Hamilton, grand dragon of the Carolinas Ku Klux Klan said yesterday he has been chosen imperial wizard of the klans in the Eastern United States.

During a telephone interview with The Times-Dispatch, Hendrix said that most of Ku Klux Klan recruiting spade work in Virginia was being done by his ally, Hamilton. Hendrix admitted that he has not been too active in the Klan's organization work of late.

Advancement "News"

Hamilton's advancement in rank, however, was "news" to an Atlanta spokesman for Klan organizations claiming to cover "the 48 States." "I hadn't heard about it," Charles H. Klein, executive secretary of the Association of Georgia Klans and the Associated Klans of America, reported.

"He must be worried," Klein added. "He must need publicity."

Hamilton and Grand Dragon Bill Hendrix, of the Florida Klan, have been working together for some time, according to the Associated Press, but both have been at outs with the Georgia Klan.

Hamilton's new post is comparable to that held by the late Sam Green, of Atlanta, after whose death the Klan

split up into State and factional groups. Before the Atlantan's death, Hamilton was a constant companion to Green.

Richmond Times-Dispatch, Feb. 10, 1952, § 2 at 1

Governor Backs Curb On Ku Klux Activities

Battle Confirms Experts Working To Draw Up Bill

By James Latimer

A bill aimed at unmasking any Ku Kluxers who try to raise their sheeted heads in Virginia may be added to Governor Battle's legislative program in the next few days.

The Governor yesterday confirmed a report that he had set legislative drafting experts to work on the problem of what legislation might be devised to checkmate the Klan.

Earlier last week a Florida KKK "grand dragon," Bill Hendrix, of Tallahassee, said a "klavern" is being formed in Richmond – a "klavern" being Ku Kluxese for local chapter or unit of the hooded hoodlums.

Governor Battle's legislative researchers are delving first into existing Virginia laws to see what statutes might already be on the books for use in controlling the Klan. None had been found yesterday, and it appeared a new law would be needed.

Antimasking Law

Any such legislation probably will take the form of antimasking laws which some other States have adopted.

The Governor told reporters the State couldn't ban secret organizations as such, but "we can condemn organizations in which people are ashamed to permit their faces to be shown and their membership to be known."

Apart from the Richmond klavern-forming, there have been unconfirmed reports the Kluxers are trying to organize elsewhere in the Old Dominion.

* * *

Richmond News Leader, Feb. 23, 1952, at 1

Name Rider Approved By House

* * *

2. The Senate approved and sent to the House the Stephens anti-Ku Klux Klan bill. Designed to outlaw masks worn in public, the bill was amended before passage to ban the burning of crosses and other similar evidences of terrorism.

* * *

Richmond Times-Dispatch, Mar. 8, 1952, at 5

Bill to Curb KKK Passed By the House

Action Is Taken Without Debate

The Senate bill to curb activities of the Ku Klux Klan in Virginia was passed yesterday without debate in the House of Delegates.

The bill now goes to Governor Battle. He recommended the measure offered by Senator A. E. S. Stephens, of Smithfield.

The bill would prohibit the wearing of masks and the burning of crosses on public property, and on private property without the consent of the owner or occupant.

Delegate John B. Boatwright, of Buckingham County, was the lone dissenter in the House. The bill was presented to the House by a former FBI agent, Delegate Mills E. Godwin, of Suffolk.

Recently, a KKK official predicted an effort would be made to organize klaverns in Virginia. The official said the first effort would come this Spring in the Richmond area.

"Very Salutary Effect"

Godwin said law and order in the State were impossible if organized groups could create fear by intimidation. He predicted the bill would have "a very salutary effect" by giving the police a method to control "activities that tend to incite resentment."

"This bill is distinctively in the public interest, and I urge the House to pass it," the Suffolk Delegate said.